No. 79-1117

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

BETTY SANDER HARVEY,

Petitioner,

vs.

HARRIS TRUST & SAVINGS BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BETTY SANDER HARVEY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Appellate Court of Illinois, First Division entered in this case on June 4, 1979 (Appendix A), and orders of the Circuit Court of Cook County, Illinois entered June 22, 1977 (Appendix C), and November 22, 1977 (Appendix I).

OPINION BELOW

The opinion below has been published in part, and may be found at 73 Ill. App. 3d 280; 391 N.E. 2d 461 and is reprinted herein as Appendix A.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District (Appendix A) was entered on June 4, 1979. Petitioner's Petition for Rehearing was denied (Appendix K) on July 9, 1979. Petitioner filed a Petition for Appeal as Matter of Right, or in the alternative Petition for Leave to Appeal to the Supreme Court of the State of Illinois, which was denied October 1, 1979 (App. J). This petition is filed within 90 days of the final order of the Supreme Court of the State of Illinois. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

HISTORY OF THE CASE

Your petitioner filed suit #76L 20780 (*Harvey* v. *Harris*), with a jury demand (App. L) in the Circuit Court of Cook County, Chicago, Illinois, on November 12, 1976, alleging breach of testamentary trust. Harris filed a Motion to Strike and Dismiss which was granted June 22, 1977. Motion to Vacate and Petition for Leave to Amend was denied on November 23, 1977 (Appendix I.) The dismissal was affirmed on June 4, 1979 in the Appellate Court of the State of Illinois, First District (*Harvey* v. *Harris,*) 78-322.

Petition for Rehearing (*Harvey* v. *Harris* #52313) was denied on July 9, 1979, no opinion rendered. Petition for Leave to Appeal to the Supreme Court of the State of Illinois was denied on October 1, 1979, the Mandate being entered on October 24, 1979.

ISSUES PRESENTED FOR REVIEW

I

Is there any evidence which furnishes a legal and substantial basis for the dismissal of petitioner's complaint by the trial court and for the affirmation of such dismissal by the Appellate Court, or have such courts acted illegally?

II

Have the rights of due process and equal justice guaranteed to all citizens of the United States of America under U. S. Constitution Amendment 14 (1) been denied to petitioner by the very courts which are mandated to protect such rights?

III

Has petitioner wrongfully been denied her Right of Trial by Jury guaranteed to all citizens of the United States under U. S. Constitution Amendment 7 through the baseless and unwarranted dismissal of her complaint, by the very courts which are mandated to uphold such right?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U. S. Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of . . . property . . . without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Seventh Amendment to the U. S. Constitution provides in pertinent part:

> "In suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

STATUTES INVOLVED

Illinois Revised Statutes, Chapter 83, Sec. 16 reads in pertinent part:

> "... actions on unwritten contracts, expressed or implied ... shall be commenced within five years next after cause of action accrued."

Illinois Revised Statutes, Chapter 83, Sec. 17, reads in pertinent part:

> "... Actions on written contracts ... or other indebtedness in writing shall be commenced within ten years next after cause of action accrued."

Illinois Revised Statute, Chapter 83, Sec. 23 reads in pertinent part:

> "... if a person liable to an action fraudulently conceals the cause of action from person entitled thereto, the action may be commenced at any time within five years after person entitled to bring same discovers that he has such cause of action."

Illinois Revised Statute, Chapter 110, Sec. 42 (2) reads in pertinent part:

> "... No pleading is bad in substance which contains such information as reasonably informs the opposite party of the claim or defense which he is called upon to meet."

Illinois Revised Statute, Chapter 110, Sec. 46 (1) reads in pertinent part:

> "... At any time before final judgment amendments may be allowed on just and reasonable terms. ..."

Illinois Revised Statute, Chapter 110, Sec. 48 (3) states in pertinent part:

> "... In a motion to Dismiss ... if a material and genuine disputed question of fact is raised the court ... shall so deny (motion), if the action is one at law and a jury demand has been filed by the opposite party in apt time."

STATEMENT OF THE CASE

Petitioner has been seeking recourse from the wrongful acts of defendant the nominated executor-trustee of her late father's estate, for nearly nine years. Each lawyer she retained has refused and failed to act on her behalf and has instead worked to protect this powerful bank. On November 12, 1976 petitioner filed complaint 76L20780 pro-se along with a jury demand, being well aware that her only hope for justice lay in a jury hearing. Harris filed a motion to dismiss along with affidavits. Such motion should have failed since it did not conform to statutory requirements and affidavits did not support the motion. Attorney Donald Brewer volunteered to represent petitioner in this matter on November 24, 1976, but instead acted as had petitioner's previous lawyers. On June 22, 1977 the Circuit Court of Cook County entered an order dismissing complaint, listing seven points, not one of which was valid basis for dismissal.

Petitioner's motion to vacate and amend was denied. Thus her cause of action which was properly governed by the 10 year statute was barred by the 5 year statute and her pro se complaint was disposed of without a single amendment and no jury hearing. After filing appeal 78-322 Brewer, unbeknown to petitioner did not raise the real statutory issue on appeal, nor keep petitioner appraiser of the status of her case and refused to communicate with her. On February 10, 1979 petitioner dismissed Brewer. Two weeks later she learned Brewer had not withdrawn and oral argument was scheduled for March 12, 1979. On that day, the court granted petitioner's motion to remove Brewer but refused to extend the time for oral argument. Petitioner was obliged to argue the matter instanter with no preparation or records. Further petitioner submits she was prevented from pursuing her argument logically due to the constant interruption by the court, raising irrelevant matters.

In argument, defendant set forth three premises, each of which was without merit, yet the Appellate Court affirmed dismissal of petitioner's complaint. The opinion reflects that such court disregarded all of petitioner's oral argument which under the circumstances of Brewer's failure to raise the proper statutory matter, and his removal was crucial. The Appellate Court denied petition for rehearing on July 9, 1979. The Illinois Supreme Court denied petition for leave to appeal on November 1, 1979.

RAISING THE FEDERAL QUESTIONS

Constitutional questions were raised as follows. (1.) Question of due process was raised in the original complaint when plaintiff alleged that Harris had failed to give notice of their intent to decline and renounce as executor. (2.) In the petition for rehearing, petitioner raised the issue of breach of rights guaranteed her under U. S. Constitution—Amendments 7 and 14, by the unwarranted dismissal of her complaint. (3.) In Petition for Appeal as matter of right or in Alternative Petition for leave to Appeal to the Supreme Court of the state of Illinois, Petitioner raised five constitutional issues concerning breach of her Civil Rights: (a.) That the trial court had applied one standard of law to her and a different one to defendant in violation of the equal protection clause of U. S. Constitutional Amendment 14, (b.) that by its baseless dismissal of her complaint the court had denied petitioner her right to remedy and justice provided for in Ill. Const. Article 1 Sec. 12. (c.) that the court by its unwarranted dismissal of her complaint filed for jury, denied her U. S. constitution Amendment 7 right to trial by Jury (d.) that the court's action in wrongfully applying the statute of limitations jeopardizes the due process and equal protection of thousands of Americans by establishing false case law . . . and undermining the framework of the system of justice.

Petitioner apologizes to this court for her pro-se status and respectfully asks this court's forbearance. Petitioner respectfully submits that self-representation is not by choice but by necessity. In her nearly 9 year struggle for justice petitioner has retained 8 lawyers and has interviewed more than fifty others seeking help. She has exhausted all possible sources of legal assistance and recourse as well as her finances. Petitioner has no legal education but diligently pursues knowledge in the law libraries, hoping to preserve her right to redress in the courts, because she had a deep and abiding faith in the American system of justice.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE FINDINGS AND ACTS OF THE TRIAL AND APPELLATE COURTS TO ASCERTAIN WHETHER THE EVIDENCE FURNISHES ANY LEGAL AND SUBSTANTIAL BASIS FOR THEIR DECISIONS IN DISMISSING PETITIONER'S COMPLAINT AND AFFIRMING SUCH DISMISSAL.

It is well settled that "dismissal of a party's action is a drastic punishment and should not be invoked except in cases where party shows deliberate disregard of the court's authority" 16 Ill. Law & Prac. § 31, p. 394. The record plainly reflects plaintiff never showed a disregard for the court's authority. "Motion to Dismiss admits all facts well pleaded and a cause of action should not be dismissed unless it clearly appears that no set of facts can be proved under pleadings which will entitle plaintiff to recovery." 16 Ill. Law Prac. § 43 p. 413. Fed. Rules of Civ. Proc. rule 12-b 28 USCA, *Louis* v. *Barenfager* (1967) 81 Ill. App. 2d 488, 218 N.E. 2d 823, *J. J. Harrington* v. *Temmerman* (1977) 8 Ill. App. 2d 483, 50 Ill. App. 3d 404, 365 N.E. 2d 721. Petitioner's complaint clearly shows on its facts that she could recover, (Appendix B) "On Motion to Dismiss every intendment and fair inference is in favor of pleading and if under any aspect of facts stated, the plaintiff could recover the motion should be denied." *Johnson* v. *Girvin,* 61 Ill. App. 2d 47, 54, *Boyd* v. *Racine Currency,* 81 Ill., App. 2d 140, 146. In the instant case all intendments were in favor of defendant. It is further settled that "pleadings must be liberally construed, . . . and the court look to substance rather than form when examining pleadings".

In Re Mourand, 83 F. 2d 728. The Trial court failed to do this just as they failed to consider that "No pleading is bad in substance which . . . informs the opposite party of the nature of the claim or defense he is called upon to meet." Ill. Rev. Stat. ch. 110 § 42 (2). Defendant acknowledged the action as breach of testamentary trust. Further "the complaint of a pro se plaintiff should be held to less stringent standards than one drafted by an attorney." *Haines* v. *Kerner,* 92 Sp. Ct. 594, 596, 404 U.S. 519, 30 L Ed 2d 652 (1972)

All of the above principles reflect the impropriety of the Dismissal of petitioner's complaint. Examination of the Order of Dismissal confirms there is no justification in fact or law for dismissal.

Although the Motion to Dismiss contained ten allegations the trial court made only seven findings (Appendix C.) To wit: (1.) Harris never accepted or qualified as executor (2.) Harris never accepted or acted as trustee, (3.) Harris accepted the assets under section 6-4, Ill. Pro. Act and preserved them, (4.) the widow renounced the will, (5.) Assets were distributed ⅓ each in accordance with probate act. (6.) The statute of limitations Sec. 16 Oral contracts bars this action (7.) Allegations of complaint are insufficient to sustain cause of action.

In examining these findings it is apparent that 1, 2, 3, are improper rulings, in that a motion to dismiss admits all facts well pleaded (Infra) and these findngs falsely and wrongfully controvert the allegations in complaint (Appendix B Par. 5, 7, through 14). Further, disputed issues of fact are for a jury. Findings 4 and 5 while true in content only screen reality. Finding 4 "that the widow renounced," and 5 "that the assets were distributed ⅓ each in keeping with the probate act" were interjected to make it appear

that such renunciation invalidated the trust, resulting in proper ⅓ distribution. However, decedent's will specifically provided otherwise (Appendix D). This fact was brought before the court in hearing on June 22, 1977.

> "Mr. Brewer: The will very explicitly said in case my wife predeceased me . . . (the legal effect of renunciation) then the items under the will and trust will go as set forth in . . . sec. 2, Clause 3 as my will provides. So it does, that fine, she renounced, but there is still a trust because the will very explicitly sets forth so." (Appendix E pp. 21, 22)

It provided for distribution to Sander's daughters, ½ each. (Appendix D) Findings 6, "that the complaint fails to state a cause of action" and 7 "that the complaint was barred by Ill. Rev. Stat. 16 . . . oral contracts" are incompatible, since "statute of limitations can never become operative until there is a cause of action to which it may be applied." *Williams* v. *Comm. Nat. Bank,* 49 Or. 492, 90 P 1012, 91 P 443, *Taylor* v. *Miles,* 5 Kan. 493. In its opinion the appellate court stated "Betty Sander Harvey alleged in her complaint that defendant accepted appointment . . . as executor-trustee . . . further that defendant breached the testamentary trust." (Appendix A p. 4 par. 3). If the Appellate Court so clearly understood the action to be breach of testamentary trust, would not logic indicate that the trial court did also since they applied a statute against it? We must then conclude that a single reason remains for dismissal. To wit: the 5 year statute of limitations, Ch. 83 § 16. Was the application founded in law?

The complaint alleges breach of testamentary trust . . . a written document. Appendix B p. 1 "Sander executed a 4 page written document . . . wherein he did bequeath . . . all of his residuary estate to . . . be held in trust." p. 8 "as a result of defendant's breach of trust . . ."

Illinois Revised Stat. ch. 83, Sec. 17 provides:

> "Actions on . . . written contracts . . . or other indebtedness in writing shall be commenced within 10 years next after cause of action accrued."

Petitioner's complaint was filed on Nov. 12, 1976. Sander died Jan. 16, 1970 there could be no possible accrual until after that date. It is apparent that Sec. 17 is the applicable Section of Limitations and that the complaint was filed timely. There is no justification for the dismissal order of the trial court.

In his motion to vacate, petitioner's attorney instead of acting in the interest of his client, and raising the matter of the ten year statute, interjected the issue of fraudulent concealment, as well as whether the trial court abused its discretion by denying petitioner's attorney the right to amend the pro-se complaint. Although both issues are valid, they obfuscate the true issue . . . the 10 year statute. The court should not have ruled upon the matter of concealment, as it was an issue of fact for a jury.

Since the extra issues were raised and ruled upon by the trial court, three issues were before the Appellate court to wit: (1) whether the 5 year statute of limitations could be invoked to dismiss the complaint. (2.) Whether fraudulent concealment tolled the statute, (3) whether the court abused its discretion in denying plaintiff's attorney the right to amend the pro-se complaint.

In examining the Appellate opinion it is difficult to ascertain just what is obiter dicta and what are findings. The court chose to comment on all ten allegations of Motion to Dismiss when three had not been ruled upon, and therefore were not properly before the court, and to review, (improperly) the entire probate proceedings. Further the court in its opinion made more than 20 false or seriously mislead-

ing statements, designed only to obfuscate the issues and frustrate review. (Appendix F, Petition for Appeal pp. 25-33) Putting aside the dicta it appears that the Appellate court held: (I) the statute was not tolled by fraudulent concealment, (II) that they were unable to review the soundness of the trial court's denial of Motion to amend (III) that it was unnecessary to determine whether or not a trust relationship existed. (IV) that the complaint was barred by Ill. Rev. St. ch. 83, Sec. 16. We will examine these individually.

(I) Ill. Rev. Stat. Ch. 83 Sec. 23 provides:

> "If a person liable to an action fraudulently conceals the cause of action from person entitled thereto, the action may be commenced at any time within 5 years after person entitled to bring same discovers that he has such cause of action."

In that regard the appellate court's opinion set forth the following misrepresentations (Appendix A p. 8): (a.) "Acts or misrepresentations affirmatively showing fraudulent concealment by defendant which prevented plaintiff from discovering she had cause of action, must be alleged." The court errs. The case at bar concerns a trust relationship and "it has been settled that failure to discover is excused when parties are in a relationship to trust". *Anderson* v. *Laybeck,* 145 N.E. 2d, *White* v. *Prenzler,* 7 Ill. 2d 624, 131 N.E. 2d 540, 543 (1956) (b.) "Defendant must have made representations or performed acts known by it to be false, with intent to deceive plaintiff on which plaintiff relied . . ." Again the court errs. It is well established that "Fraud which tolls the statute can be mere silence." *Sabeth* v. *Handler Co* (1962) 102 Ill. App. 218, 234 N.E. 2d 738, *Gibbons* v. *Brandt,* 170 F. 2d 385, 69 S. Ct. 511, Ill. 1948, *Hale* v. *Hale,* 15 Ill. Dec. 85, 373 N.E. 2d 431 (1978). . . . Assuming arguendo that representations and acts were

necessary, such are clearly set forth in Complaint p. 4 par. 13, p. 15 par. 16, 17, p. 6 par. 18, 19. (Appendix B.) There are six allegations of concealment yet the appellate court states "we can find nothing in the record which would suggest defendant made representations or performed acts which fraudulently concealed a cause of action." (c.) "When party affected by fraud might have discovered it with ordinary diligence section 23 does not come into play" Again the court errs. "failure to discover fraud is excused where there is relationship of trust and confidence and duty is imposed on trustee to disclose the truth. In such cases running of the statute arises when fraud is discovered." *Anderson* v. *Laybeck, Winger* v. *Chicago City Bank,* 325 Ill. App. 459, 60 N.E. 2d 560, 572, further, "fraud may be predicated on false representations and concealments although the truth could have been ascertained by examination of public records" *Citizens Savings and Loan* v. *Fisher,* 214 N.E. 2d 612, 67 Ill. App. 29. And "Negligence cannot be imputed to a defrauded party so that he who commits fraud cannot escape liability. *Smith* v. *Niemann,* 216 Ill. App. 179, *Citizens Savings* v. *Otto,* 240 Ill. App. 567. Again "question of concealment within the meaning of an exception to statute is proper one for the jury." *Kurry* v. *Frost,* 204 Ark. 386, 162 S. W. 2d 48, Annotation 10 ALR 2d 564, 565. By reason of the aforegoing the Appellate court clearly erred in determining that fraudulent concealment would not toll the statute. Its decision conflicts not only with opinions of other appellate courts but with those of this court.

(II) The second finding, that the Appellate court was unable to determine the soundness of trial court's denial of Plaintiff's counsel's motion to file an amended complaint . . . is an enigma, since the court ascribes their inability to render a decision, to the failure of petitioner's counsel to

include a copy of the proposed amended complaint in the record. Under other circumstances such reason may be valid, but surely not when the original complaint was pro se.

The right to amend is an inherent right in Illinois courts. Ill. Rev. Stat. (1975) Ch. 110 § 46 (1) provides:

> "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party . . . as plaintiff or defendant, discontinuing any plaintiff or defendant, changing cause of action or defense or adding new causes of action or defense . . . any proceedings which may enable plaintiff to sustain the claim for which it was intended to be brought, or the defendant to make a defense or assert a cross demand."

If such liberality in amending is allowed generally, surely a pro se complaint should be allowed amendment. In *Haines* v. *Kerner* (infra), this court mandated that pro se complaints should be held to less stringent standards, but the appellate court by denying amendment held pro se complaint to "more."

The principle of amending is rooted in common law 229 c. C. Ill. 844, which permitted amendments to pleadings if there was anything to amend." *Nelson* v. *Barker,* Fed. Cas. No. 10, 101, 3 McLean 379.

In *Lamonte* v. *Bellville,* 41 Ill. App. 3d 697, 355 N. E. 2d 70, 71 it was held that: Amendments should be liberally allowed to save rights and advance justice. This principle has been vigorously upheld by Appellate courts. *Kilmer* v. *Parrish,* 144 Ill. App. 279, *Snively* v. *Crownover* (1947) 53 N. E. 2d 321 Ill. App. 292 (1957), *Dyreson* v. *Hughes,* 76 N.E. 2d 809, 333 Ill. App. 1968.

In *Geneva Construction Co.* v. *Martin Trans.,* the court stated: "The Civil practice Section pertinent to amendment of pleadings is the culmination of legislative efforts to enact a provision under which relation back of amended pleading will be governed by considerations of fairness to litigants rather than technical considerations." Far from allowing amendment for fairness, the trial court discouraged it. In fact the trial court specifically requested that no amended complaint be filed until after final judgment. Report of Proceedings, Motion to Vacate, confirms:

> Mr. Brewer: "My client filed this complaint initially pro se. I believe I told your Honor that back some months ago when I asked leave to file an amended complaint . . . you said at that time you would rather wait until after we have decided this motion."

Petitioner concedes that although the right to amend is well established, it may still lie within the court's discretion. Yet, "even where decision is placed in discretion of the court, the exercise of that discretion must be a sound one." *Langnes* v. *Green,* 282 U.S. 531, 75 L. Ed. 520. The principle of amending is so sacred courts have held "Amendments may be made after verdict or judgment to conform pleadings and proof." *Rogers* v. *New York C. & St. L. Rwy. Co.* (1946) 65 N.E. 2d 243, 328 Ill. App. 123. In the case at bar, amendment was essential to make pleasing conform with proof because, inter alia, when petitioner filed such complaint she had not yet discovered the well concealed fact that defendant had not renounced as trustee.

In *Thomas* v. *Gouwens,* 25 Ill. App. 3d 663, 323 N.E. 2d 829, 831, and *Jackson* v. *Jackson,* 14 N.E. 2d 271, 294 Ill. App. 552 it was determined "Refusal of an amendment which is germane to the original bill and presented for purposes of making the allegations of bill comply with proof, is an abuse of the trial court's discretion." The Ap-

pellate court's argument, that they could not determine the issue because they did not have a copy of the Amended complaint is absurd. Does that court truly believe a pro-se petition would not improve with a lawyer's amendment? This is tantamount to declaring that lawyers have no more knowledge or ability in matters of law than laypersons. Does this not make a travesty of the system of justice and the honorable profession of law?

Clearly there was no basis in law or in fact for this finding.

(III.) The Appellate court's finding that "it was unnecessary to determine the question of whether a trust relationship existed, since any such relationship terminated when plaintiff was informed of defendant's renunciation as executor trustee" is, of course, a determination in itself. And it is an improper one because it sanctions the improper act of the trial court in determining an issue of fact in a Motion to dismiss. The issue was for jury 51 Am Jur 2d 488. The Appellate court is ingeniously deceitful, . . . stating "when plaintiff was informed of defendant's renunciation" Defendant did not renounce as Trustee. (Appendix G) The fact that petitioner was informed that it did, and that it fraudulently concealed the fact that it did not, until after this complaint was filed, does not excuse its fraudulently concealed breach of trust, nor dissolve the trust relationship. "Renunciation of a trust can be only by resignation with court approval, or with agreement of the beneficiaries on satisfaction of all legal liabilities to beneficiaries." 76 AmJur 2d Ch 128 § 308 and "Declination or refusal of a trust does not operate to defeat or void the trust." *Re Estate of Newman,* 86 Nev. 151, 465 P 2d 616. When this finding "that the relationship terminated when defendant renounced, "is read in conjunction with a previous misleading statement in the opinion (Appendix A p. 4) "(Petitioner . . . alleged . . . defendant breached the testamentary trust when it filed a renunciation of its appointment" it is apparent that once again the court is screening reality to justify the Dismissal by the five year statute. (note the court does not specify what appointment.) As herebefore set forth it renounced as executor only. (Appendix G) The fact is, petitioner did not allege "breach through renunciation," but clearly sets forth the acts performed. (Appendix B, Par. 15 through 20). Petitioner readily acknowledges that her complaint states "defendant renounced as trustee." The fact that it did not, was not discovered by plaintiff until December, 1976. The misconception was to be cured with Amendment, which was denied. But Petitioner argued the matter in oral argument Appendix H-2. The issue however is a moot one in regard to preservation or sufficiency of petitioner's complaint. Whether or not defendant resigned does not mitigate its breach of trust nor diminish its liability.

The finding is a non-sequitor however since if no trust relationship existed contrary to allegations in complaint, the complaint could not be dismissed by statute. *Williams* v. *Comm. Nat. Bank, Taylor* v. *Miles.* (Infra)

We must conclude then, if the appellate Court found it unnecessary to determine the trust issue, the entire opinion is a nullity, because the cause of action is Breach of testamentary trust, and failure to determine the issue of the relationship makes it impossible to justify dismissal by any fact or law.

(IV) The conclusion of the Appellate court that "plaintiff's complaint was filed November 12, 1976, over five years after all pertinent events in this action transpired, the suit is barred. See Ill. Rev. Stat. (1975) ch. 83 Sec. 16" is erroneous. Not once in its opinion does the court recite Sec. 16, which provides:

". . . actions on unwritten contracts, expressed or implied . . . shall be commenced within five years next after cause of action accrued."

In its opinion the court acknowledged cause of action as "breach of testamentary trust." (Appendix A p. 4 par. 3). It cannot be disputed that a testamentary trust is a written document (Appendix D). Ill. Rev. Stat. (1975) Ch. 83 Sec. 17 provides ten years in which an action on a written document can be brought. There is no justification for applying Ch. 83 Sec. 16. Further, fraudulent concealment was alleged tolling the statute. (Ill. Rev. Stat. Ch. 83, Sec. 23)

It is well settled that "a pleading which sets off statute which is not applicable to cause of action to which statute is interposed is bad . ." 54 CJS § 361 (b) and "where a shorter period of limitations than the one applicable to case is pleaded, the plea is lost." *Button* v. *Wakelin,* 15 P 2d 956, 41 Ariz. 84. Yet the trial court preserved the plea and sanctioned it as did the Appellate court.

There was no justification for barring the complaint by any statute since "defense of Limitations cannot be raised in motion to Dismiss." *Burnap* v. *Wight,* 14 Ill. 303. Further Motion to Dismiss on plea of statute of limitations should be denied as to an action which complaint did not definitely fix date of accrual of cause of action" *U. S.* v. *Kern,* DC Ny, 8 F Supp. 296. Such date was not fixed (Appendix B) as acknowledged by the court: "We should note, plaintiff failed to indicate when she acquired knowledge of the alleged concealed cause of action to commence running of statute." (Appendix A p. 8, par. 3)

"The law favors the right of action rather than the right of limitation." *Re Goldsworthy,* 148 ALR 722, 45 NM 406, 115 P2d 627. And "if there is any doubt as to which of two statutes apply the longer rather than shorter is preferred." *Payne* v. *Ostrus,* Ca. 8 50 F.2d 1039, 77 ALR 531. Petitioner conceded that her attorney did not properly

bring this issue before the court, yet respectfully submits there could be no question of the correct statute when petitioner argued the point vigorously (Appendix H-1 Report of Proceedings) concluding: "the point is there was a will and trust, it was a written contract, and that carries a ten year statute."

It is well established that a "statute of limitations applies only to the particular actions which it recites and no others, and the court cannot under guise of construction, apply statute of limitations to cases not within statutory provisions." *Kirkman* v. *Hamilton,* 6 Pet. (U.S.) 20, 8 L.Ed. 305. Yet the court in the case at bar did just that.

In reviewing the decisions of the lower courts it is apparent that the above well established principles of law were overlooked. Yet even if all of the foregoing were not to be considered, there is still no conceivable justification for dismissal of petitioner's Complaint under Ill. Rev. Stat. Ch. 83, Sec. 16, because "Express trusts are exempt from the statute of limitations or laches" *Schreiner* v. *City of Chi.* (1970) 495 Ill. 617, 32 N.E. 2d 113. There was no basis in either fact or law for the rulings of the lower courts.

II.

PETITIONER HAS BEEN DENIED HER RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW PROVIDED UNDER AMENDMENT 14, UNITED STATES CONSTITUTION, BY THE VERY COURTS WHICH SHOULD PROTECT SUCH RIGHTS.

Petitioner acknowledges that dismissal by Motion, of a Complaint filed for jury may not in itself be a denial of due process and equal protection clauses of Amendment 14. However when the state court's rulings are as unsubstantiated as herebefore set forth (infra 7-19) the question of

equal protection and due process must come under scrutiny. "The 14th amendment of the U.S. Constitution forbids a denial of any fundamental principles of liberty and justice." 15 AmJur 2d §7. Yet the rulings of both courts deny fundamental principles of justice because the rulings are without substantiation in fact or law. They are inconsistent with the doctrine of Stare Decises which requires that "law clearly established by a court, should not be lightly disregarded . . . but should be adhered to." *In re Hearles estate,* 300 NYS 103, 109, 110, 165 Misc. 46. "The doctrine rests upon the principles that law by which men are governed should be fixed, definite, and known." Petitioner submits law cannot be known if it is subject to arbitrary application, as in the case at bar. *In re Palmer's Adm's* v. *Mead,* Conn. 149, 157, 158 the court stated: "Stare Decises is eminently just. If law well established may be annulled by an opinion, a foundation is laid for the most restless instability . . . no system of inflexible adherence to established law can be as pernicious, as ceaseless and interminable fluctuations." In the instant case the courts overlooked or misapprehended more than 12 provisions of Ill. Statutes, along with supporting case law, flagrantly disregarding the doctrine of stare decises as well as the fact that "the proper function of courts is to administer justice in accordance with established rules of law." 20 Am Jur 2d VI § 64, *Greguske* v. *Oyster Bay,* 19 Misc. 2d 763, N NS 2d 432. The lower courts failed to perform their function or fulfill their purpose.

In *Glicker* v. *Michigan Liquor Control Comm.,* CCA Mich. (1947, 160 Fed. 96, the court held: "The purpose of U.S. Constitution Amendment 14 Sec. 1 is to secure every person within states jurisdiction against intentional and arbitrary discrimination, whether incurred by express terms of a statute or by its improper execution by the courts." And this court ruled "even if the law is fair

on its face and impartial in appearance, the 14th Amendment is violated, if the law is administered with an evil eye and an unequal hand so as to make unjust and illegal, discrimination between persons in similar circumstances." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 30 L Ed. 220, 6 S. Ct. 1046. This is a landmark case which has had wide application.

On its face Ill. Rev. Stat. ch. 83 Sec. 16 is fair and impartial. However when this 5 year statute is applied to bar a complaint that is properly governed by the 10 year statute, it has been administered with an evil eye and unequal hand, making unjust and illegal discrimination between persons in similar circumstances, thereby breaching Amendment 14. There are approximately 75,000 suits for breach of contract filed in the Circuit Court of Cook County each year. Of all those alleging breach of written contract which petitioner has reviewed she has not found one which was dismissed on Motion by reason of the statute of limitations Ch. 83, Sec. 16.

In *Duncan* v. *Missouri,* Mo. (1894) 145 S. Ct. 152, US 382, 38 L. Ed. 485 this court held that "equal protection of the law is secure if the laws operate on all alike so not to subject the individual to arbitrary exercise of the powers of government" . . . "Such powers include all who exercise those powers . . whether . . . legislative or judicial." *Ex rel. Lawson* v. *Woodruff* (1939) 184 So. 81, 134 Fla. 437.

If the court applied to all other persons who filed suit for breach of written agreement . . . the same law . . Ill. Rev. Stat. Ch. 83, Sec. 16 . . that was applied to petitioner, then all such suits would be subject to dismissal five years before the time provided by the law. Clearly then, the laws of the state would be a mockery. Of what value is the statute, Ch. 83, Sec. 17, designed to preserve actions stemming from breach of written documents for ten years, if

the courts can intentionally and arbitrarily bar such suits under the five year statute?

However, if the law provides ten years within which a cause of action can be brought for breach of written agreement, as it does, and all others, more than 32,000 yearly in Cook County, Illinois, who bring suit for such reason are granted the ten years within which to file, as the records reflect, while petitioner's suit is dismissed as barred within five years, it is apparent that petitioner's equal protection of the law is denied. "When it is apparent that the same law, or course of procedure would not and could not lawfully be applied to any other person in the state under similar circumstances, the equal protection clause of the law is denied by state courts." *Ex Parte Stricker,* cc Ky (1901) 109 F. 145.

In *Buchalter* v. *New York,* 319 U.S. 427, 87 L. Ed. 1492, 63 S. Ct. 1129 this court ruled that the "due process clause required that action by a state through any of its agencies must be consistent with fundamental principles of liberty and justice." Could the courts actions in the instant case . . . misrepresenting material facts, deciding other facts in Motion to Dismiss. . . . intentionally discriminating against petitioner by barring her suit which was properly governed by the 10 year statute, by the 5 . . . be consistent with fundamentals of justice?

Since "due process of laws means that which the following the forms of law is appropriate to the case and just to the parties to be affected." *Hagar* v. *Reclamation Dist.,* 111 US 701, 28 L. Ed. 569, 4 S. Ct. Petitioner submits her due process has been denied. In *MacKenna* v. *Ellis* (1960) F. 2d 592, 595 the court states: "It is basic to due process that . . a person have a fair opportunity to tell his story in a fair trial . . He is entitled to have the effective, wholehearted assistance of counsel . . . entitled to have a hearing guided by a judge who is sensitive to duty of protecting constitutional rights in all cases."

Petitioner has had none of these. The trial court misapplied the statute of limitations and other well established principles of law, thus wrongfully dismissing her complaint, denying her a fair opportunity to present her story in a fair trial to a jury. Petitioner's attorney refused and failed to act on her behalf or raise the proper issue of the ten year statute on appeal necessitating his dismissal. The court denied time to obtain other counsel, thus denying petitioner effective wholehearted assistance of counsel. The trial court decided issues of fact in a motion to dismiss, removing them from jury hearing, misapprehended or misapplied more than 12 statutory provisions, and denied any and all amendment to a pro se complaint. The Appellate Court sanctioned all of the wrongful acts of the trial court, set forth 20 serious misrepresentations of material fact (Appendix F, pp. 19-34) in argument, decoying her from the issues. Clearly she did not have hearings guided by judges who were sensitive to protecting constitutional rights.

Petitioner respectfully submits her 14th Amendment Rights were denied by the very courts which should protect them.

III.

PETITIONER HAS BEEN DENIED HER RIGHT TO JURY TRIAL PROVIDED UNDER U. S. CONSTITUTION AMENDMENT 7, BY THE VERY COURTS WHO SHOULD PROTECT SUCH RIGHTS.

Amendment 7 of the United States Constitution provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

In the instant case, the value in controversy is well over $700,000, yet petitioner was deprived of her jury trial by the unwarranted dismissal of her complaint. It is well settled that "if a material question of fact is raised in an action at law where a jury demand has been filed by the party in opposition to the Motion to Dismiss, the trial court must deny the motion." Ill. Rev. Stat. (1975) ch. 110, Sec. 48 (3) *Pennington* v. *Jones,* 46 Ill. App. 3d 65. *Pennington* is a highly analagous case since it involves a fiduciary relationship, as well as a pro-se plaintiff.

The right to jury is well established. In *Wagner* v. *Anna,* 296 N.E. 2d 589, 591, Ill. App. 3d 316 the court held "trial by jury is a constitutional right. Dismissal is not available on discretion." In *People* v. *Schoos* (1948) 399 Ill. 527, 78 N.E. 2d ALR 1096 the court stated: "All substantial incidents and consequences which pertain to right of trial by jury at common law, and its essential features, must be preserved and its benefits secured to all entitled to the right."

In *Fellheimer* v. *Weis* (1942) 316 Ill. App. 449, 45 N.E. 2d 89 the court ruled: "Summary judgment may not be used to impair right to jury trial, and in *Diversey* v. *Neunkirchen,* 370 Ill. 523, 19 N.E. 2d 363, 120 ALR 1395 the court held that: "the trial of an issue of fact by affidavits on motion to dismiss, would deprive the right to jury trial." In the case at bar that is precisely what the court did. Further the affidavits were a nullity since they did not support the motion. "Where statute requires that certain fact be shown, failure to state the facts requisite to establish it renders the affidavit ineffectual." *Anderson* v. *Anderson,* 82 N.E. 311, 229 Ill. 538.

In commenting on the 7th Amendment, the Honorable William O. Douglas and Owen J. Roberts wrote: "The framers of the constitution considered the right to jury trial to be of great significance. Experience has shown that

juries bring a quality of mercy and good common sense to the administration of the laws, when lawyers and judges forget where justice lies. . . . for hundreds of years they have been an important safeguard between man and his government."

Petitioner respectfully submits that she desperately needs this safeguard.

For nearly 9 years petitioner has been seeking legal redress in this matter through the Courts of Illinois. It is a monumental task since defendant is a politically and financially powerful bank, with great influence in the legal community while petitioner is a mere woman. Petitioner has had four written contracts with lawyers who have agreed to sue defendant. They have demanded great sums of money but have acted only in defendant's interest. Space will not permit review of the harassment and discrimination petitioner has suffered by the courts. As a last resort petitioner filed this pro-se complaint with jury demand, aware that her only hope for justice lay with a jury. This effort too was frustrated by the court's baseless dismissal, upheld, improperly, by the Appellate Court. Petitioner has an abundance of evidence to support the allegations in her complaint. She asks only that she be given her constitutional right to present it to a jury as Amendment 7 provides. The right was denied by the very courts which should uphold it.

CONCLUSION

Petitioner believes the inferior courts have proceeded illegally, and have breached her Civil Rights. There is no other mode provided for reviewing the proceedings. "The U. S. Supreme Court has the ultimate power to search the records in State Courts where a claim of constitutionality is effectively made, so that no constitutional freedom, least of all the guarantees of the Bill of Rights will be defeated by unsubstantial findings of fact screening reality." USCA Cont. Amd. 1 et seq. and 14, *Milkwagon Driver's Union of Chi. Local 753* v. *Meadowmoor Dairy,* 61 S.C. 552, 312 U.S. 287, 85 L.Ed. 836 ALR 1200.

WHEREFORE, petitioner prays a writ of certiorari be granted; and, upon consideration of the substance of Petitioner's argument, the dismissal should be reversed as repugnant to due process of law.

Respectfully submitted,

BETTY SANDER HARVEY
834 Monroe Ave.
River Forest, Illinois 60305
Pro Se Petitioner

APPENDIX

APPENDIX A

First Division
Filed June 4, 1979

78-322

BETTY SANDER HARVEY (a/k/a DAVIS), DOUGLAS ALAN DAVIS and WILLAM PORTER DAVIS,
Plaintiffs-Appellants,

vs.

HARRIS TRUST AND SAVINGS BANK,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County.
Honorable DANIEL P. COMAN, Judge Presiding.

MR. JUSTICE CAMPBELL delivered the opinion of the court:

This is an appeal taken by the plaintiff from orders of the circuit court of Cook County granting the defendant's motion to strike and dismiss the complaint and denying the plaintiff's motions for leave to file an amended complaint and to vacate the dismissal. The issues presented for review are: (1) whether the trial court abused its discretion in denying the plaintiff's motions; and (2) whether there was sufficient proof of fraudulent concealment of a cause of action by the defendant to serve to avoid the applicable five-year statute of limitations. We affirm.

The factual background giving rise to this action is as follows:

Ernest J. Sander (decedent), died testate on January 16, 1970, survived by Emma Sander, his second wife, and two daughters, Marjorie Sander and Betty Sander Harvey, the plaintiff herein. He was also survived by his divorced first wife, Mae Sander, the mother of his two daughters. At the time of his death Ernest J. Sander and

his second wife, Emma, resided in Walkerton (Starke County), Indiana.

The decedent's will, which was dated December 27, 1955, nominated Chicago National Bank as the executor and trustee. This bank merged with Harris Trust and Savings Bank, the defendant herein. The record indicated that on February 19, 1970, the decedent's safe deposit box at Mid-City National Bank was opened. The contents of the box, which consisted of the decedent's assets as well as the aforementioned will, were turned over to the defendant as the nominated executor. The will was filed in the probate division of the circuit court of Cook County and, thereafter, transferred to Starke County, Indiana.

The record shows that on April 30, 1970, a conference was held in the defendant's offices with the decedent's widow, two daughters and their attorneys in attendance. At this conference the defendant stated that it would not accept the appointment under the will as the executor and trustee because of the failure of the decedent's family to cooperate with each other, the nature of the assets, and the potential claims and liabilities that might arise as a result of such appointment.

On May 4, 1970, Marjorie and Mae Sander opened probate proceedings by filing a petition for letters of administration to collect in the probate division of the circuit court of Cook County. Mae Sander, the decedent's first wife, was appointed administrator to collect in this proceeding. She filed a motion to order the defendant to turn over the decedent's Illinois assets.

On July 13, 1970, the court ordered that this motion be continued pending the appointment of an administrator with the will annexed as requested in a petition filed by Emma Sander in a second Illinois probate proceeding.[1]

[1] Although the exact date of the filing of this petition is unclear, the record indicates that it occurred shortly after Emma Sander moved to Illinois on June 15, 1970.

In her petition Emma Sander nominated herself as administrator with the will annexed. On July 17, 1970, Betty and Marjorie Sander filed a cross-petition for letters of administration with the will annexed in which they nominated Betty for the appointment and stated under oath that the defendant refused to accept the nomination as executor.

Meanwhile, on June 5, 1970, another probate proceeding was instituted in the circuit court of Starke County, Indiana. Letters of administration were issued to Emma Sander and Betty Sander Harvey as co-administrators of the decedent's estate. The record shows that on May 6, 1970 the defendant filed a renunciation of its appointment as executor in the circuit court of Starke County, Indiana. Subsequently, on July 13, 1970, the defendant filed a renunciation of its appointment as executor in the circuit court of Cook County.

On September 9, 1970, Emma Sander, by an order of the circuit court of Cook County, was appointed administrator with the will annexed in the second Illinois probate proceeding. The court then heard the motion raised by Mae Sander in the first Illinois probate proceeding to order the defendant to turn over the decedent's Illinois assets. This motion was denied. On September 23, 1970, Emma Sander presented the defendant with a certified copy of the order appointing her administrator with the will annexed. The defendant then proceeded to deliver the assets of the estate which had come into its possession as the nominated executor to Emma Sander who in turn presented the defendant with a receipt. Thereafter, the defendant had no further involvement with the decedent's assets or his estate.

In closing the first Illinois probate proceedings in conjunction with her status as administrator to collect, Mae Sander filed on December 4, 1970 a petition in lieu of a final accounting. In filing an answer on December 8, 1970,

Emma Sander, as administrator with the will annexed in the second Illinois probate proceeding, stated that she and the defendant, as the nominated executor, had diligently collected and preserved the assets belonging to the decedent in Illinois, Iowa and Indiana and, therefore, no further action would be necessary to collect said assets.

On May 18, 1971, Betty Sander Harvey and Marjorie Sander filed a petition for removal and to surcharge Emma Sander as administrator with the will annexed. In this petition they again stated that the defendant had refused to accept the nomination as executor and also raised various issues charging loss, damage and waste in connection with the assets of the decedent's estate. They further alleged that counsel for Emma Sander had harassed and threatened them thereby causing a substantial delay in the opening up of the administration of the estate in Illinois. They contended that counsel for Emma Sander had intimidated and threatened the defendant to such an extent that it refused to accept the appointment as the decedent's executor. On July 2, 1971, they filed an amended petition for removal and to surcharge Emma Sander in which they again stated that the defendant had declined to accept the appointment as executor. The court held in favor of Emma Sander and denied the petition.

On October 22, 1970, Emma Sander, as the decedent's widow, renounced the decedent's December 27, 1955 will. The assets of the decedent's estate were sold and the proceeds distributed in accordance with the renunciation of the will. Emma, as the widow, and Betty and Marjorie, as the decedent's daughters, were each to receive one-third of the estate. Pursuant to a May 27, 1971 order in the second Illinois probate proceeding the first partial distribution of the proceeds was made with the delivery to the above mentioned individuals of checks dated June 1, 1971, in the amount of $20,000 each. The record fails to indicate when the estate of Ernest J. Sander was actually closed.

On November 12, 1976 Betty Sander Harvey filed the present action in the form of a pro se complaint on behalf of herself and her two sons, Douglas Alan Davis and William Porter Davis, grandsons of the decedent against the defendant, Harris Trust and Savings Bank.[2] Betty Sander Harvey, as the sole plaintiff, alleged in her complaint that the defendant had accepted the appointment under the decedent's will as executor and trustee. She further alleged that the defendant had breached the testamentary trust of the decedent when it filed a renunciation of its appointment. The plaintiff sought $750,000 in damages as a result of this alleged breach.

On December 16, 1976, the defendant filed a motion to strike and dismiss the complaint. It alleged that the plaintiff's claims had already been adjudicated in the circuit court of Cook County in a prior action filed by the plaintiff against the defendant bank; that the claim asserted against the defendant is barred by the determination of the issues or the opportunity to have such issues determined in the two aforementioned Illinois probate proceedings; that the claim is barred by the statute of limitations; that the defendant properly took possession of the decedent's assets and delivered them to the personal representative of the estate; and that the plaintiff did not state a cause of action against the defendant. The defendant included affidavits and exhibits in support of said motion. Included was the affidavit of Mr. Abbey Blattberg, an attorney for the defendant, as well as the affidavit of Mr. Daniel Engstrom, a vice-president of the defendant bank. The plaintiff did not file any counter-affidavits.

The plaintiff subsequently retained legal counsel and on February 24, 1977 her attorney filed an appearance and made a jury demand. On June 22, 1977 the defendant's

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[2] No appearance was made by the decedent's grandsons nor was an appearance made by an attorney in their behalf. Therefore, they are not parties to this action.

motion to dismiss the complaint with prejudice was sustained by the trial court. In issuing said order the court held that the defendant never accepted the nomination as executor or trustee under the will of Ernest J. Sander and stated further that the defendant properly took possession of the decedent's assets and preserved them until they were turned over to Emma Sander as administrator with the will annexed. The court also found that the allegations in the complaint were insufficient to sustain a cause of action and that pursuant to Section 16 of the Limitations Act (Ill. Rev. Stat. 1975, ch. 83, sec. 16), the plaintiff's action was time barred.

The plaintiff's counsel filed a motion, on July 18, 1977, to vacate the June 22, 1977 order alleging fraudulent concealment of a cause of action by the defendant. A motion for leave to file an amended complaint was also filed by the plaintiff's attorney at that time. The defendant filed a response to these motions on October 7, 1977, in which it denied that there was a concealment of any cause of action. Thereafter, a hearing was had on said motions and they were denied with prejudice on November 23, 1977. The plaintiff filed her notice of appeal on December 22, 1977, thus commencing the instant appeal.

The plaintiff initially ascribes error to the trial court's refusing to allow her leave to file an amended complaint and denying her motion to vacate the dismissal. While it is true that section 4 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 4) provides that all sections of the Act, including the one relating to the amendment of pleadings (see Ill. Rev. Stat. 1975, ch. 110, par. 46(1)) be liberally construed, leave to amend the pleadings prior to the entry of final judgment is within the sound discretion of the trial court. (*Beagley* v. *Andel* (1978), 58 Ill. App. 3d 588, 374 N.E.2d 929; *Erzrumly* v. *Dominick's Finer Foods* (1977), 50 Ill. App. 3d 359, 365 N.E.2d 684.) "(T)he denial of a motion to amend will not be regarded as prejudicial error unless there has been a manifest abuse of discretion." (*Mundt* v. *Ragnar Benson, Inc.* (1975), 61 Ill. 2d 151, 161, 335 N.E.2d 10; accord, *Simon* v. *Plotkin* (1977), 50 Ill. App. 3d 603, 365 N.E.2d 1022.) It is also well settled in Illinois that the decision to vacate and set aside judgments rests within the sound discretion of the trial court. *Village of LaGrange Park* v. *Hess* (1928), 332 Ill. 236, 163 N.E. 672; *Czyzewski* v. *Gleeson* (1977), 49 Ill. App. 3d 655, 365 N.E.2d 577.

The plaintiff asserts that considering the circumstances in the instant case it was a manifest abuse of discretion for the trial court to deny her motions. She asks this court to apply more lenient procedural standards to pro se litigants than is generally allowed attorneys. However, the Illinois Supreme Court in *Biggs* v. *Spader* firmly established that the pro se litigant must comply with the same rules of procedure required of attorneys. (*Biggs* v. *Spader* (1952), 411 Ill. 42, 103 N.E.2d 104; accord, *National Bank of Austin* v. *First Wisconsin National Bank of Milwaukee* (1977), 53 Ill. App. 3d 482, 368 N.E.2d 119.) Furthermore, although no counsel appeared of record for the plaintiff when the case was first filed on November 12, 1976, counsel was retained and made an appearance and jury demand on behalf of the plaintiff as early as February 24, 1977. This was four months prior to the hearing on the defendant's motion to strike and dismiss the complaint and nine months before the defendant's motion to vacate was argued. It should be reiterated that at no time did counsel for the plaintiff file any counter-affidavits. Where one party files an affidavit and the other party does not file a counter-affidavit in response, the facts alleged in the affidavit are taken as true. (*Loughman Cabinet Co.* v. *C. Iber and Sons, Inc.* (1977), 46 Ill. App. 3d 873, 361 N.E.2d 379.) Therefore, the defendant's uncontroverted affidavits which accompanied its motion to strike and dismiss the complaint must be taken as true. Finally, although the plaintiff's attorney withdrew prior to oral arguments in

this court, he did so in response to the plaintiff's motion to discharge and her election to conduct oral arguments in her own behalf.

The plaintiff's second contention raised in this appeal is that she should have been afforded an opportunity to amend her complaint to show that the defendant had fraudulently concealed a cause of action. She argues that her action is not barred by the statute of limitations because section 23 of the Limitations Act (Ill. Rev. Stat. 1975, ch. 83, par. 23) is applicable in this case. We cannot agree.

Section 23 of the Limitations Act provides:

> "If a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action and not afterwards." (Ill. Rev. Stat. 1975, ch. 83, par. 23.)

Acts or misrepresentations affirmatively showing fraudulent concealment of a cause of action by the defendant which prevented the plaintiff from discovering she had a cause of action must be alleged by the party seeking to avail herself of section 23 of the Limitations Act. (*Brainerd* v. *Flannery* (1978), 59 Ill. App. 3d 991, 373 N.E.2d 26; *Wilson* v. *LeFevour* (1974), 22 Ill. App. 3d 608, 317 N.E.2d 772.) The defendant must have made representations or performed acts which were known by it to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied. (*Wilson; Edwards* v. *Chicago and Northwestern Railway Company* (1967), 79 Ill. App. 2d 48, 223 N.E.2d 163.) Furthermore, when the party affected by the fraud might have discovered it with ordinary diligence section 23 of the Limitations Act does not come into play. (*Bush* v. *Continental Casualty Company* (1969), 116 Ill. App. 2d 94, 253 N.E.2d 619.) Finally, "(m)ere silence of the defendant and mere failure on the

part of the plaintiff to learn of a cause of action do not amount to such fraudulent concealment." *Chicago Park District* v. *Kenroy, Inc.* (1978), 58 Ill. App. 3d 879, 887, 374 N.E.2d 670; accord, *Bush; Antczak* v. *Antczak* (1965), 61 Ill. App. 2d 404, 209 N.E.2d 838.

Applying these principles to the case at bar, it is evident that the plaintiff has failed to meet the requirements imposed by Section 23 of the Limitations Act. We can find nothing in the record which would suggest that the defendant made representations or performed acts which fraudulently concealed a cause of action from the defendant. The plaintiff's claim is premised on the defendant's failure to perform an accounting. However, the failure on the part of the defendant to perform an accounting of the assets held by it does not by itself constitute fraudulent concealment. (See *Kenroy, Inc.; Bush; Antczak.*) The plaintiff should have requested an accounting.

We should note that the plaintiff failed to indicate when she acquired knowledge of the alleged concealed cause of action to commence the running of the statute of limitations. In addition, the plaintiff has failed to incorporate a proposed amended complaint into the record on appeal alleging facts in support of her claim of fraudulent concealment. Consequently, we are unable to review the soundness of the trial court's decision and must assume that it did not abuse its discretion in denying the plaintiff's motions for leave to amend the complaint and vacate the dismissal. *Lowrey* v. *Malkowski* (1960), 20 Ill. 2d 280, 170 N.E.2d 147, *cert. denied* (1961), 365 U.S. 879, 6 L.Ed 2d 191, 81 S.Ct. 1029; *Erzrumly* v. *Dominick's Finer Foods* (1977), 50 Ill. App. 3d 359, 365 N.E.2d 684.

We find it unnecessary to determine the issue discussed by both parties as to whether or not a trust relationship existed between the defendant and the decedent's estate because any such relationship which may have existed

terminated when the plaintiff became aware of the defendant's renunciation of its appointment as executor and trustee. Indeed, there is evidence to suggest that the plaintiff was informed of the defendant's renunciation as early as April 30, 1970, while she attended a conference being held in the defendant's offices. In any event it is clear that the plaintiff obtained knowledge of the defendant's renunciation no later than July 2, 1971 when in filing an amended petition for removal and to surcharge Emma Sander she stated under oath that the defendant had declined to accept the appointment. We conclude, therefore, that since the plaintiff's complaint was filed on November 12, 1976, over five years after all of the pertinent events in this action had transpired, the suit is barred. See Ill. Rev. Stat. 1975, ch. 83, sec. 16.

We should also note that the plaintiff has not offered any reason why the matters raised herein could not have been brought to the attention of the probate court. The plaintiff was a party to or had a chance to participate in two Illinois probate proceedings and thus had ample opportunity to present all the matters deemed necessary in that court.

For the foregoing reasons the orders of the circuit court of Cook County are affirmed.

Affirmed.

GOLDBERG, P.J., and McGLOON, J., concur.

APPENDIX B

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

BETTY SANDER HARVEY (AKA DAVIS), DOUGLAS ALAN DAVIS, WILLIAM PORTER DAVIS,

Plaintiffs,

v.

HARRIS TRUST AND SAVINGS BANK, an Illinois Corporation

Defendant

NO. 76 L 20780

COMPLAINT AT LAW

NOW COME the plaintiffs, BETTY SANDER HARVEY (AKA DAVIS), DOUGLAS ALAN DAVIS, and WILLIAM PORTER DAVIS, and complaining of the defendant, HARRIS TRUST AND SAVINGS BANK, an Illinois corporation, state as follows:

1. That they are heirs of the Estate of Ernest J. Sander, deceased, which matter has been instituted and is pending in the Probate Division of the Circuit Court of Cook County, Illinois, under general #70P5652, Docket 746, Page 551.

2. That during his lifetime, the decedent Ernest J. Sander did execute a four-page written document, known as a Last Will and Testament, under date of December

27, 1955, wherein he did give, devise, and bequeath all of his residuary estate to the Chicago National Bank, a National Banking Association, as trustee in trust for the purposes set forth in the aforesaid Last Will and Testament, and as executor of same.

3. That the said decedent Ernest J. Sander further provided in his last will and testament that the income from the trust estate shall be used for the maintenance and welfare of his wife, Emma Sander, payments to be not less than $50 per week. Upon the death of said wife "the trustee shall divide the whole of the capital of such trust estate then remaining, including all gains and increases of capital thereof, if any, into two (2) equal parts or shares and shall convey transfer and pay 1 (one) of such equal shares to each of my daughters . . . In the event of the death of either daughter . . . prior to complete distribution of her share . . . such share or remainder . . . shall be distributed . . . to her descendants." Betty Sander Harvey (aka Davis) is the daughter of Ernest J. Sander, deceased, and Douglas Alan Davis and William Porter Davis are sons of said Betty Sander Harvey (aka Davis).

4. That thereafter, and prior to the death of the said decedent, Ernest J. Sander, which date of death is January 16, 1970, the assets of the said Chicago National Bank were acquired by the defendant, Harris Trust and Savings Bank, an Illinois corporation, and merged with the assets of said bank.

5. That through the aforementioned transaction, said defendants, Harris Trust and Savings Bank, became the successor of the business of the said Chicago National Bank, and was responsible for all of its obligations, assets, and liabilities. Therefore, the defendant, Harris Trust and Savings Bank, became the executor, trustee of the Estate of Ernest J. Sander, deceased, under the terms of the express testamentary trust of Ernest J. Sander, deceased, as set forth in 9 C.J.S. section 468 page 928: "A bank which

acquires the assets of another bank under circumstances showing that it is a legal successor of such other bank becomes liable for the debts and obligations of the old bank, although the transaction may not be strictly a consolidation or merger, as where the purchasing bank takes over all the assets of the other bank, assumes all its known liabilities, and causes such other bank to discontinue business by a voluntary liquidation."

This fact was reaffirmed by Mr. Ralph Blaha, attorney, acting for the Harris bank, in a letter to the decedent, Ernest J. Sander's surviving spouse, dated January 23, 1970: to wit that Harris Trust and Savings Bank "succeeded Chicago National Bank in all trust matters where it had been named."

6. That on July 1, 1969, approximately six months prior to his death, the decedent Ernest J. Sander, apparently responding to a June 26, 1969 letter from the Harris Trust and Savings Bank, did confirm by letter, his last will and testament dated December 27, 1955, that it created a trust, that Chicago National Bank was named both executor trustee and that said will was in his safe deposit box.

7. That subsequent to the death of Ernest J. Sander, the defendant Harris Trust and Savings Bank was represented by Mr. N. Daniel Engstrom at the examination of the decedent's safe deposit box #3450 at the Mid City National Bank of Chicago, 807 West Madison Street, Chicago, Illinois, which fact is attested to by the document subtitled "Schedule of Contents" dated February 19, 1970. It states: Information supplied by Mr. N. Daniel Engstrom, Harris Trust and Savings Bank.

8. That on February 20, 1970 the Harris Bank through their attorney, Mr. Ralph Blaha, caused the last will and testament of the decedent, Ernest J. Sander, to be filed in the Probate Division of the Circuit Court of Cook County Illinois.

9. That on or about February 25, 1970, representatives of the Harris Trust and Savings Bank, Mr. Braddock, Mr. Engstrom, and others, met with one of the plaintiffs, Betty Sander Harvey (aka Davis) to discuss the circumstances surrounding the decedent's death and a possible wrongful death suit, stemming from said death.

10. That the defendant, Harris Trust and Savings Bank, on March 4, 1970, removed and took custody of all the assets and property, including stocks, bonds, deed to property, insurance policy, and last will and testament, which reposed in the decedent, Ernest J. Sander's safe deposit box. The aforementioned act was confirmed in a letter addressed to Phillip Makin on March 4, 1970.

11. That subsequently on March 10, 1970, Mr. Phillip Makin, an attorney acting on behalf of the said Emma Sander, sent to the Harris Trust and Savings Bank further assets and property of the decedent Ernest J. Sander, including dividend checks from Adams Express Co., Northern Illinois Gas, Studebaker Worthington, Commonwealth Edison, Voting Proxies for 1970 meeting of Adams Express, American Motors, and check book of Ernest J. Sander from the Harris Trust and Savings Bank, Chicago, all of which were accepted by said defendant, Harris Trust and Savings Bank.

12. That on March 23, 1970, said Attorney Mr. Phillip Makin sent to N. Daniel Engstrom of the Harris Trust and Savings Bank further property and assets of the decedent, Ernest J. Sander, including his personal and corporate income tax returns, dividend checks from St. Regis Paper, U. S. Steel, tax bill from treasurer's office, Allamakee County, Iowa, cancelled checks, correspondence photocopies of dividend checks and Form 1099 Dividend Records . . . all of which the defendant, Harris Trust and Savings Bank, accepted. The defendant also procured an extension agreement from the IRS to prepare and file the 1040 tax return.

13. That on a number of occasions, one of the plaintiffs, Betty Sander Harvey (aka Davis), conversed with

the defendant, Harris Trust and Savings Bank, concerning problems in the estate, the corporation of the decedent, and wrongful acts of an attorney, Mr. Phillip Makin, in regard to the decedent's estate, and on each occasion she was reassured by Mr. N. Daniel Engstrom that the assets of Ernest J. Sander, deceased, were securely in the keeping of the defendant, Harris Trust and Savings Bank.

14. That through all of the above mentioned acts the defendant, Harris Trust and Savings Bank, did accept, affect, and establish said Bank's appointment as trustee of the Estate of Ernest J. Sander, deceased, as set forth in 76 Am Jur. 2nd section 124.

"Acceptance of a trusteeship ordinarily may be made without any formality. Such acceptance may be effected, established or proved by . . . acts fairly implying consent," as established in *Hoffman* v. *Gould* 64 NE 2nd 773, 327 Ill. App. 428. "Exercising power over property is an acceptance of trust."

15. That subsequent to the aforementioned facts the defendant, Harris Trust and Savings Bank took no action whatsoever to open the probate proceedings but rather allowed Mr. Phillip Makin, an attorney retained by said Emma Sander, to collect the assets, control the decedent's business and take possession of the decedent's personal property contrary to 35 Ill LP section 142 p 328 which states:

"It is the exclusive right and duty of the trustee to collect or reduce to possession the property and assets which belong to an estate within a reasonable time. (*Holyoke* v. *Con Ill Bank* 104 NE 2nd 838) and further contrary to 32 Ill D 295 Key 181

"Where trustee holds legal title to trust property with right of possession, he cannot remain dormant with impunity; and the mere fact that party from whom trustee must obtain property is evidently a reputable attorney at that time, does not excuse the trustee's failure to take steps

to secure trust property, nor change legal duty of trustee."

"Where trustee alone has sole power to invest and reinvest trust property, it is emphatically trustees duty to take possession thereof."

The defendant allowed said Phillip Makin to take possession, in spite of the fact that said Phillip Makin had already shown his bad faith by attempting to gain access to the decedent's safe deposit box after his death, claiming he was alive; by representing that the decedent's will was invalid, since said Phillip Makin had drawn subsequent wills; and by representing that said Emma Sander was Administrator of the Estate on January 27, 1970. All of the aforementioned facts were untrue, designed to destroy the trust of Ernest J. Sander and all were known to Harris Trust and Savings Bank. Yet said Bank allowed Phillip Makin to intermeddle in the duties which were rightfully those of the defendant, Harris Trust and Savings Bank. It would have seemed that the defendant would have acted with untold authority and utmost haste to protect the estate.

16. That unbeknown to the plaintiffs, on March 13, 1970, Mr. Ralph Blaha, attorney for Harris Trust and Savings Bank, appeared in Probate Court and effected a transfer of the decedent's will to Starke County, Indiana. The plaintiffs have since learned that the decedent, Ernest J. Sander, filed his Income Tax Return from the State of Illinois, and took great pains to preserve his legal residency in said state. The transfer was unwarranted and questionable in nature and caused the estate to suffer great financial loss as well as confusion and complications in the probate matters.

17. That on June 5th with the full knowledge and consent of defendant, Harris Trust and Savings Bank, an Estate was opened in the Circuit Court of Starke County, Indiana #3481 in which the Plaintiff Betty Sander Harvey (aka Davis) and Emma Sander were appointed co-administratrix. Said proceeding was unproper, unbeknown to the

plaintiff at the time, since the will and trust were still in effect. It was further improper since said Emma Sander, who had formerly resided in the State of Indiana, had moved to Chicago on or before May 1, 1970, and therefore neither administrator was a resident of the State of Indiana, as required by law. Thus plaintiff Betty Sander Harvey (aka Davis) was unwittingly made a party to the wrongful acts, well known to the defendant, Harris Trust and Savings Bank.

18. That on the thirteenth day of July 1970 which was a full six months lacking three days after the death of said decedent, Ernest J. Sander, during all of which time the defendant Harris Trust and Savings Bank had been acting in the Estate of said decedent, said Bank filed a document in the Circuit Court of Cook County which reads: "This matter coming on to be heard upon the motion of Ralph C. Blaha, attorney for Harris Trust and Savings Bank, presenting the Renunciation and Declinations of Harris Trust and Savings Bank, together with Continental Illinois" (Continental Bank being successor trustee named in the decedent's trust). By causing their attorney Ralph Blaha to concurrently, in one document, file their renunciation and the declination of the successor trustee Continental Illinois Bank, they willfully and wrongfully but effectively destroyed the trust of Ernest J. Sander. This is clearly a travesty of the law and contrary to just practice to wit: "A trust will not be permitted to fail for want of a trustee." 90 CJS section 211 p 139. (*DeKorwin* v. *1st National Bank of Chicago* 70 S Ct. 1028 339 US 982 94 6ed 1386)

90 CJS section 217 p 158, 159: "A court of equity or its equivalent may and ordinarily will appoint a trustee where the designated trustee refuses, or neglects to execute the trust . . . or declines after accepting . . . or where the qualified or acting trustee withdraws on his own petition." Why was not this done?

The Plaintiff Betty Sander Harvey (aka Davis), heir at law, received no written notice of the intention of the defen-

dant, Harris Trust and Savings Bank, to withdraw from its trusteeship, nor was said Plaintiff notified of the date the Defendant would petition to withdraw, nor was said Plaintiff present in court when such petition was heard.

Further, to the best knowledge of the Plaintiff, no accounting was ever presented to the Court by the Defendant, Harris Trust and Savings Bank, at the time of their renunciation, prior thereto or subsequent thereto. And although a trustee may under proper circumstances withdraw or resign, the law clearly requires from said trustee, an accounting.

19. That subsequent to the withdrawal of the defendant, Harris Trust and Savings Bank, the Plaintiff learned that in violation of section 3 of the trust instrument by which the Harris Bank agreed to "hold, manage lease, care for and protect said trust estate," they in fact allowed the decedent's business, an Illinois corporation known as John Sander Inc., to be wrongfully usurped and controlled by Attorney Phillip Makin and his client, Emma Sander. Then without the knowledge of the plaintiffs, the defendant, Harris Trust and Savings Bank who had by the trust instrument sole direction over the said corporation, allowed the voluntary cessation of operations of said corporation to be effected. Trusts are always imperative and are obligatory on the conscience of the person entrusted (65 CJP 218 note 7) "they are made with strict reference to their faithful execution and it has been said the entire doctrine of trusts rests on the principle that equity regards that as done which should be done. Since the primary object of a trust is to confine the powers of the beneficiary and deprive him of any power to dispose of and manage the trust." *Kilgore* v. *State Bank of Colusa* 21 NE 2nd 9 300 Ill App 404 affirmed 25 NE 2nd 29 372 Ill 578

The heirs were not only powerless, they were uninformed, and did not learn of such act for several years.

20. That the Harris Trust and Savings Bank did breach the testamentary trust of the decedent Ernest J. Sander after they had accepted the same which breach resulted in waste, loss and untold damages to the estate of the decedent, and to the Plaintiffs Betty Sander Harvey (aka Davis), Douglas Alan Davis, and William Porter Davis. That among these losses are the decrease in the value of the decedent's securities, the unaccounted for dividends from said securities, the total dissolution of the decedent's corporation, whose stock was evaluated by Carl Safanda of the defendant, Harris Trust and Savings Bank, in a report dated April 21, 1970 to be worth $85.09 per share of which there were 999, the building at 1053-55 West Lake Street which was estimated to be $100,000, all of the rents collected by the corporation and various bank accounts, as well as approximately $25,000 spent by the plaintiffs, during the six years they have sought redress in courts for the losses incurred from the breach of the trust of the decedent Ernest J. Sander in the Harris Trust and Savings Bank.

The plaintiffs further state that they, and in particular Betty Sander Harvey (aka Davis), have suffered inestimable physical and emotional strain and damage and further have devoted untold hours of time which, during the six years, could have been used for gainful employment.

The Plaintiffs further state that as a result of the failure of the defendant Harris Trust and Savings Bank to fulfill the terms of the decedent's trust, the plaintiffs have had their confidence in the institutions of banking and law, which are two of the undergirding institutions in our American society, undermined and damaged beyond comprehension—for all of which the defendant Harris Trust and Savings Bank is clearly responsible as stated: "In accepting a trust, trustee is presumed to know obligation and limitations connected with his high office and if he transgresses, must abide by the consequences." *Piff* v. *Berresheim* 405 Ill. 617 *Martin* v. *Rodeford trust* 281 Ill 441

A trustee after he has accepted the office, cannot discharge himself from liability merely by a subsequent resignation. 35 Ill. L P section 106 p 301 96 CJS section 225 p 181

"A trustee has the duty of protecting and preserving the trust properly from loss and injury, and he is liable for a loss resulting from his failure to exercise reasonable care, prudence and diligence." *Holyoke* v *Continental Ill Bank* 1952 104 NE 2nd 838 *Strauss* v. *Chicago Title and Trust* 1933 273 Ill App 63

As a result of the defendant Harris Trust and Savings Bank's breach of trust of the decedent Ernest J. Sander, the plaintiffs have been damaged in the sum of seven hundred fifty thousand dollars ($750,000.00).

Wherefore, the plaintiffs Betty Sander Harvey (aka Davis), Douglas Alan Davis, and William Porter Davis pray that the court enter a judgment against the defendant, Harris Trust and Savings Bank for seven hundred fifty thousand dollars.

/s/ *Betty Sander Harvey*
Betty Sander Harvey (aka Davis)

Betty Sander Harvey
Attorney Pro Se
and for Plaintiffs
834 Monroe Avenue
River Forest, Ill. 60305
369-6549

Subscribed and sworn to
(SEAL) before me this 12th day
of November, 1976
/s/ *Phil E. Gierman*
Notary Public

APPENDIX C

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — LAW DIVISION

No. 76 L 20780

BETTY SANDER HARVEY (a/k/a DAVIS), DOUGLAS ALAN DAVIS, and WILLIAM PORTER DAVIS,
Plaintiffs,

v.

HARRIS TRUST AND SAVINGS BANK,
Defendant.

ORDER

THIS CAUSE coming on to be heard upon the motion of Defendant, Harris Trust and Savings Bank (hereafter "Harris"), to Strike and Dismiss the Complaint, and the Court having before it said Complaint, Motion and the Affidavits filed by Defendant, Harris, in support of said motion, and having heard the statements and arguments of counsel for the parties herein, finds that:

Defendant, Harris, never accepted or qualified as Executor under the will of Ernest J. Sander, Deceased.

Harris never accepted or acted as the trustee under the trust set forth in said Will of Ernest J. Sander, Deceased.

Harris in taking possession of assets of Ernest J. Sander after his death and preserving them until it turned them over to the Administrator With the Will Annexed after her appointment, acted under and pursuant to the Illinois Probate Act, Section 6-14 (formerly Section 79).

The Will of Ernest J. Sander, Deceased, was renounced by the widow, Emma Sander, on October 22, 1970, pursuant to order of this Court entered on that date.

The assets of the Estate were distributed one-third (⅓) each to the widow and the two daughters, Betty and Marjorie in accordance with Sections 2-8(a) and (c) of the Illinois Probate Act.

The Statute of Limitations—Section 16—"Oral contracts—Arbitration awards—Damage to property—Possessory actions—Civil actions" of Chapter 83 of the Illinois Revised Statutes bars this and any cause of action by the Plaintiffs.

The allegations of the Complaint are insufficient to sustain a cause of action.

IT IS THEREFORE ORDERED that the Complaint be and the same hereby is stricken and this cause of action is hereby dismissed with prejudice.

ENTER:

Judge Daniel P. Coman
JUN 22 1977
Circuit Court

APPENDIX D

LAST WILL AND TESTAMENT
of
ERNEST J. SANDER

I, ERNEST J. SANDER, of Chicago, Illinois, make this, my Last Will and Testament and revoke all former Wills and Codicils by me made.

FIRST: I direct my Executor to pay out of the principal of my estate all my just debts, funeral expenses and costs of administration. I further direct my Executor to pay out of the principal of my estate, or to make deposits therefrom to secure such payments, all estate, inheritance, transfer and succession taxes, including any interest and penalties thereon, which may be assessed in any way by reason of my death, and I hereby waive on behalf of my estate any right to recover from any person, including any beneficiary of insurance on my life, any part of such taxes so paid.

SECOND: I give and bequeath all my clothing, jewelry, personal effects, house furnishings, automobiles and other articles of household or personal use or adornment, to my wife, EMMA SANDER, if she survives me, otherwise to my surviving children, to be divided equally among them as they determine, or if they fail to agree upon such division within six (6) months after my death, then as my Executor shall determine.

THIRD: All the residue of my estate and property, real and personal, wheresoever situated, including all lapsed legacies and devises, I give, devise and bequeath to CHICAGO NATIONAL BANK, a national banking association, 120 S. LaSalle St.,

Ernest J. Sander
D.C.H.
WFL
RCB

Chicago, Illinois, as Trustee, in trust, for the purposes hereinafter set forth.

SECTION 1: The entire net income from the trust estate, commencing at the time of my death, shall be paid to my beloved wife, EMMA SANDER, in convenient installments during her lifetime. In addition to the foregoing provision in favor of my said wife, the Trustee shall be fully authorized to pay to my said wife such sums from the principal of the trust estate as in its sole discretion shall be necessary or advisable from time to time, for the medical care, comfortable maintenance, and welfare of my said wife, taking into consideration all other income and cash resources available to my said wife for such purposes and all sources known to the Trustee. Payments to my wife, EMMA SANDER shall not be less than Fifty Dollars ($50.00) per week, including any Social Security payments to her as my dependent.

SECTION 2: Upon the death of my said wife, EMMA SANDER, the Trustee shall divide the whole of the capital of such trust estate then remaining, including all gains and increases of capital thereof, if any, into two (2) equal parts or shares, and shall convey, transfer and pay over one (1) of such equal parts or shares to each of my daughters, MARJORIE H. SANDER and BETTY MAE DAVIS, if they shall be then living. In the event of the death of either of my daughters prior to complete distribution of her share, then upon such child's death, such share or the remainder thereof, shall be distributed per stirpes to her then remaining descendants, if any, or if none, then per stirpes to my then living descendants.

SECTION 3: The Trustee shall hold, manage, lease, care for, and protect said trust estate and collect the income therefrom, all in accordance with its best judgment and discretion, being fully authorized

to cause any securities or other property, real or personal, belonging to the trust estate to be held or registered in its name or in the name of its nominee or in such other form as it deems best without disclosing the trust relationship. Any leases that may be made may commence at the time of making or on a future day and may be for any period of time the Trustee thinks best, though extending beyond the term of the trust. The Trustee may continue to hold any property or securities received at the commencement of the trust. The Trustee shall be authorized to invest and reinvest the trust estate as shall be permitted by law and by the statutes of the State of Illinois. It is also authorized to borrow money, to extend or renew any existing indebtedness, and to mortgage or pledge any property in the trust estate; and no purchaser or mortgagee shall be obliged to see to the application of any purchase or mortgage money. The Trustee may vote either in person or by general or limited proxy, or refrain from voting, any corporate securities for any purpose. The Trustee may exercise or sell any subscription or conversion

Ernest J. Sander
D.C.H.
WFL
RCB

rights, and may avail itself of any options or benefits under any life insurance policies; it may consent to or join in any voting trusts, reorganizations, consolidations, mergers, foreclosures, and liquidations, and in connection therewith, may deposit securities with or under the direction of any protective committee under such terms as the Trustee may deem advisable,

and may accept and hold any securities or other property received through the exercise of any of the foregoing powers. The Trustee is authorized to settle, compromise, contest, prosecute, or abandon claims in favor of or against the trust estate as it may deem advisable. For the purposes aforesaid, the Trustee may execute and deliver all proper and necessary instruments and may give full receipts and discharges. The Trustee shall also have the power to determine how all receipts and disbursements, including the Trustee's compensation, shall be credited, charged, or apportioned as between income and principal, and the decision of the Trustee shall be final and not subject to question by the beneficiary of the trust. The Trustee is authorized in its sole discretion to divide or distribute the trust property in undivided interests or in kind, or partly in cash and partly in kind, and to sell such property as the Trustee may deem advisable for the purpose of making division or distribution. The judgment of the Trustee as to values for the purpose of such division or distribution shall be binding and conclusive on all persons.

SECTION 4: The Trustee shall render to the beneficiary of the trust estate statements of account of its receipts and disbursements as Trustee hereunder at least semi-annually. The Trustee shall be entitled to receive a fair and just compensation for its services hereunder and shall also be reimbursed for all reasonable expenses incurred in the management and protection of the trust estate.

SECTION 5: In the event of the dissolution or resignation of the Trustee hereunder, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO is hereby appointed Successor Trustee to administer the trust estate, with all of the

duties, rights, titles and powers, as if originally named as Trustee.

FOURTH: In the event that my said wife, EMMA SANDER shall predecease me, or if my said wife and I shall die in a common accident or common disaster, or under such circumstances as to render it difficult or impossible to determine with certainty whether or not my said wife survived me, then and in any of such events, the trust herein created shall not come into being and my Executor shall make distribution to my children, or their issue, as in Section 2, Clause Third, in this my Will, provided.

FIFTH: I hereby appoint CHICAGO NATIONAL BANK Executor of this, my Will. I give to my Executor full power and

Ernest J. Sander

D.C.H.
WFL
RCB

3.

authority to sell at such time or times as it, in its absolute discretion, shall deem best at public or private sale and without order of court any property, real or personal, belonging to my estate. During the period of administration of my estate, my Executor is authorized and empowered to join with my Trustee in the exercise of all powers and discretions given to my Trustee, and to the extent that my Executor has sole custody or control of any property, it is given with respect to such property all the powers and discretions herein conferred upon the Trustee, the same to be exercised by said Executor without application to or confirmation by any court. In the event of the dissolution or resignation of the Executor herein named, CONTINENTAL ILLINOIS NATIONAL

BANK AND TRUST COMPANY OF CHICAGO is hereby appointed Successor Executor, with all of the duties, rights and powers as if originally named as Executor.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27 day of December, A. D. 1955.

Ernest J. Sander (SEAL)

The above and foregoing instrument, consisting of four (4) typewritten pages, this one included, each of which bears the signature of the Testator, ERNEST J. SANDER, was on the day of the date thereof signed, sealed, published and declared by the Testator as and for his Last Will and Testament, in the presence of us, who at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto; believing the said Testator, ERNEST J. SANDER to be of sound and disposing mind and memory at the time of so subscribing our names.

Name: *Dorothy C. Holmes*
Address: 1109 Holley Court, Oak Park, Ill.

Name: *William F. Lentsch*
Address: 7420 N. Campbell Ave., Chicago, Ill.

Name: *Ralph C. Blaha*
Address: 747 N. Leamington Ave., Chicago, Ill.

APPENDIX E

I believe it was,—now I turned it over and lost it. Yes, 2-8.

> "If a will is renounced in the manner provided by this section, any future interest which is to take affect in possession or enjoinment at or after the termination of the estate or other interests given by the will of the surviving spouse, takes affect as though the surviving spouse had pre-deceased the testator, unless the will expressly provides that in a case of renunciation the future interests shall not be accelerated."

The will very explicitly said in case my wife pre-deceases me or we die in a common disaster, then the items under the will and trust will go as set forth in the paragraphs previous to the paragraph making that statement and I can read it to you exactly. "As in Section 2, Clause 3, as my will provides." So, it does, that's fine that she renounced, but there is still a trust because the will very explicitly sets forth. So, I think that Harris's position in trying to say there is no trust that is kind of without

APPENDIX F

B.

In delivering its opinion, the Appellate Court set forth more than twenty incorrect and/or misleading representations made by defendant as true. This is difficult to understand since these misstatements were brought before the court in the oral argument. They include but are not limited to the following:

p. 1. par. 2.

Ernest Sander died . . survived by his second wife.

THE RECORD WILL SHOW THAT ON JULY 13, 1971 AN AMENDED ORDER OF HEIRSHIP WAS ENTERED IN THE ESTATE OF SANDER WHICH ORDER HELD THAT SANDER'S ONLY HEIRS WERE HIS TWO DAUGHTERS.

p. 1. par. 2.

At the time of his death Sander resided in Walkerton, Indiana.

THE RECORD WILL SHOW THAT SANDER'S LEGAL RESIDENCY WAS IN ILLINOIS.

p. 1. par. 3.

The will was filed in the circuit court of Cook County and subsequently transferred to Indiana.

THE COURT FAILS TO STATE THAT IT WAS THE DEFENDANT WHO WRONGFULLY TRANSFERRED TO INDIANA WITHOUT KNOWLEDGE OF PLAINTIFF.

p. 2. par. 1.

The record shows that on April 30, 1970, a conference was held in defendant's office with decedent's widow, two daughters and their attorneys in attendance.

THE RECORD WILL SHOW THAT SAID MEETING WAS ATTENDED ONLY BY PLAINTIFF, HER SISTER AND PLAINTIFF'S MOTHER'S ATTORNEY. PLAINTIFF AND HER SISTER HAD NO LEGAL COUNSEL.

p. 2. par. 1.

At this conference defendant stated it would not accept the appointment as executor trustee because of the failure of the decedent's family to cooperate with one another.

DEFENDANT DID NOT STATE IT WOULD NOT ACCEPT THE APPOINTMENT. IT STATED ONLY THAT IT BELIEVED IT WOULD NOT BE IN ITS BEST INTEREST TO DO SO . . . AND THAT IT WOULD ADVISE THE DAUGHTERS AT A FUTURE DATE OF THE DECISION. IT DID NOT SO ADVISE. FURTHER THERE WAS NO LACK OF COOPERATION BETWEEN MEMBERS OF THE DECEDENT'S FAMILY, EXCEPT THAT WHICH THE BANK, AND THE LAWYERS FOR EMMA AND MAE DEVISED.

p. 2. par. 2.

Marjorie and Mae opened probate proceedings.

ONLY MAE OPENED SUCH PROCEEDINGS, MARJORIE HAD NO COUNSEL.

p. 2. par. 3.

On July 17, 1970, Betty and Marjorie filed a cross-petition for letters of administration.

MAE'S ATTORNEY FILED SAID PETITION ON MAE'S BEHALF.

p. 2. par. 4.

On May 6, 1970 defendant filed a renunciation in the Circuit Court of Starke County.

THE RECORD WILL SHOW SUCH PETITION WAS FILED JUNE 5, 1970, THE SAME DAY THE ESTATE WAS OPENED IN STARKE COUNTY.

p. 2. footnote 1.

> The record is unclear as to when Emma filed a petition in Illinois to be appointed A/W/W/A . . . but indicates it was after Emma moved to Illinois on June 15, 1970.

THE RECORD WILL SHOW EMMA'S PETITION WAS FILED AUGUST 21, 1970, AND THAT EMMA MOVED TO ILLINOIS ON MAY 1, 1970. HER APPOINTMENTS IN ILLINOIS AND INDIANA WERE BOTH IMPROPER SINCE A VALID WILL AND TRUST EXISTED. FURTHER SHE WAS NOT AN INDIANA RESIDENT AS THE LAW REQUIRES.

p. 3. par. 3.

> Emma stated that she and defendant had diligently collected and preserved the assets.

DEFENDANT DID INDEED COLLECT THE ASSETS AS EXECUTOR. HOWEVER, THE RECORD CLEARLY STATES THAT SUCH ASSETS WERE NOT PRESERVED. THIS IS A QUESTION OF FACT WHICH MUST BE DETERMINED IN COURT. (SEE APPENDIX, EXHIBITS)

p. 4. par. 2.

> Assets of decedent's estate were sold and proceeds distributed in accordance with the renunciation of the will. One third each to Emma as widow, and to each of decedent's two daughters.

THIS IS ENTIRELY FALSE. THE EFFECT OF RENUNCIATION WAS THAT THE WIDOW HAD PREDECEASED THE TESTATOR. IN THAT EVENT THE WILL PROVIDES THAT THE PROCEEDS WERE TO PASS ONLY TO DECEDENT'S DAUGHTERS. THE ASSETS WERE NOT DISTRIBUTED IN ACCORDANCE WITH THE RENUNCIATION . . . EMMA WRONGFULLY RECEIVED MORE THAN ONE-THIRD.

p. 4. par. 2.

> The record fails to indicate when the estate of Ernest J. Sander was actually closed.

ALTHOUGH PLAINTIFF HAS TWO CONFLICTING DOCUMENTS CONCERNING THE CLOSING, ON JULY 28, 1979, SHE OBTAINED A CERTIFIED COPY OF AN ORDER REFLECTING THAT SUCH ESTATE WAS CLOSED NOVEMBER 29, 1976. PLAINTIFF RECEIVED NO NOTICE OF SUCH HEARING. IN *RAMSAY* v. *RAMSAY*, 10 Ill. 2d 459, THE COURT RULED:

> Role as trustee could not be assumed until the estate was closed, when the jurisdiction of the probate court over the matter would cease.

THEREFORE PLAINTIFF'S COMPLAINT COULD NOT BE BARRED BY STATUTE, SINCE IT WAS FILED NOVEMBER 12, 1976, AND DEFENDANT'S ROLE AS TRUSTEE COULD NOT BE DETERMINED UNTIL NOVEMBER 29, 1976.

p. 4. par. 2.

> No appearance was made by decedent's grandsons, nor an appearance made by an attorney in their behalf. Therefore, they are not parties to this action.

DECEDENT'S GRANDSONS WERE NAMED AS CO-PLAINTIFFS IN THIS COMPLAINT AND WERE PARTIES THERETO. PLAINTIFF'S ATTORNEY FAILED TO FILE HIS APPEARANCE FOR THEM.

p. 4. par. 5.

> Plaintiff did not file counter affidavits.

PLAINTIFF RESPECTFULLY SUBMITS THAT PLAINTIFF'S ATTORNEY DID NOT FILE COUNTER AFFIDAVITS DESPITE THE FACT THAT PLAINTIFF MARKED EACH FALSIFICATION IN DEFEN-

DANT'S AFFIDAVITS, VERIFIED SAME WITH LEGAL DOCUMENTS AND GAVE THEM TO HER ATTORNEY WHO ASSURED HER COUNTER AFFIDAVITS WOULD BE FILED. PLAINTIFF BROUGHT THIS BEFORE THE COURT IN HER ORAL ARGUMENT.

p. 6. par. 3.

> Plaintiff asks court to apply more lenient procedural standards to pro se litigants than is allowed to attorneys . . . Illinois Supreme Court in Biggs v. Spader established pro se litigants must comply with same rules of procedure required of attorney.

THE COURT ERRS. AT NO TIME DID PLAINTIFF ASK FOR MORE LENIENT PROCEDURAL STANDARDS. BIGGS v. SPADER IS NOT AN ANALOGOUS CASE. IN *BIGGS* v. *SPADER,* THE LITIGANT'S APPEAL WAS DISMISSED BECAUSE HE FAILED TO INCLUDE A COPY OF THE ORDER OR AN ABSTRACT IN THE RECORD ON APPEAL. PLAINTIFF IN THIS INSTANT DID NOT FAIL TO FILE PROPER DOCUMENTS OR FOLLOW PROPER PROCEDURE. PLAINTIFF PROPERLY RELIES ON U.S. SUPREME COURT (1972) *HAINES* v. *KERNER,* 404 U.S. 519, 30 L.Ed. 2d 652, 92 S. C. 594, 596 WHICH PERTAINS TO THE SUFFICIENCY OF A COMPLAINT AS DOES THE QUESTION RAISED IN THE INSTANT CASE.

HAINES ESTABLISHED:

> The complaint of a pro se plaintiff cannot be held to the same stringent standards as formal pleadings drawn by an attorney. Since it did not appear beyond doubt that plaintiff could prove no set of facts in support of his claim, he was entitled to the opportunity to offer proof.

HAINES IS AN ANALOGOUS CASE, AND SUPERCEDES *BIGGS* BOTH IN THAT IT IS A 1972 RULING AND THAT IT IS AN OPINION OF THE UNITED STATES SUPREME COURT.

p. 7. par. 1.

> At no time did counsel for plaintiff file counter affidavits.

THE COURT REPEATS THIS POINT AS IF TO ESTABLISH THE VALIDITY OF SUCH AFFIDAVITS. HOWEVER, SUCH AFFIDAVITS ATTACHED TO THE MOTION TO DISMISS ARE A NULLITY. THEY CANNOT BE CONSIDERED WITH THE SECTION 45 OBJECTIONS BECAUSE SUCH AFFIDAVITS AND EXHIBITS DO NOT SUPPORT ALLEGATIONS OF DEFECTS IN THE COMPLAINT. *MUTUAL TOBACCO CO. INC.* v. *HALPIN* (1953), 414 Ill. N.E. 2d 155; *ELLIOTT* v. *ILLINOIS CENTRAL R.R.* (1943), 318 Ill. App. 112, 119, 47 N.E. 2d 375; *LOUIS* v. *BARENFANGER* (1967), 81 Ill. App. 2d 68, 235 N.E. 2d 851. NOR CAN THEY BE USED TO SUPPORT THE PART OF THE MOTION FILED UNDER SECTION 48, SINCE THEY MERELY CONTROVERT THE ALLEGATIONS OF THE PLAINTIFF'S COMPLAINT. SINCE A MOTION TO DISMISS CONCEDES AS TRUE ALL FACTS WELL PLEADED, THE AFFIDAVITS HAVE NO MEANING AND THE ALLEGATIONS IN THE MOTION TO DISMISS SHOULD HAVE FAILED. *O'FALLEN DEVELOPMENT C.* v. *RING* (1976), 37 Ill. 2d 84, 224 N.E. 2d 782; *LOGAN* v. *PRES. ST. LUKES HOSP.* (1968), 92 Ill. App. 2d 68, 235 N.E. 2d 851.

p. 8. par. 1.

> Acts or misrepresentations affirmatively showing fraudulent concealment must be alleged.

THE APPELLATE COURT ERRS. IT HAS BEEN HELD IN *WOOD* v. *WILLIAM,* 142 Ill. 269:

> Defendant can fraudulently conceal without some affirmative act, but the onus is on plaintiff to prove it.

IN *SABETH* v. *HANDLER CO.* (1968), 102 Ill. App. 2d 218, 234 N.E. 2d 728 THE COURT RULED:

> The representations made by defendant constitute in our opinion at the very least a statement that would amount to fraudulent concealment.

THUS STATEMENTS TOO, NOT JUST ACTS, ARE CONSTRUED AS CONCEALMENT. *SABETH* CARRIED THE PREMISE EVEN FARTHER STATING:

> Fraud which tolls the statute can be mere silence.

GIBBON v. *BRANDT,* 170 F. 2d 385, 69 S. Ct. 511 Ill; IN *GRUNDY COUNTY NATIONAL BANK* v. *WESTFALL,* 301 N.E. 2d 28, 13 Ill. App. 3d 839,

> Statute of frauds which has as its purpose the prevention of fraud will not be permitted to be used where the effect would be to accomplish a fraud and if facts are such that it would be a virtual fraud to permit defendant to interpose the statute, the court will not listen to that defense.

FURTHER DEFENDANT AND PLAINTIFF WERE IN A RELATIONSHIP OF TRUST.

> The failure to discover is excused when parties are in a relationship of trust, and duty is imposed on trustee to disclose the truth; *Anderson* v. *Laybeck,* 154 N.E. 2d 259.

p. 8. par. 2.

> We can find nothing in the record which would suggest that the defendant made representations or performed acts which fraudulently concealed a cause of action.

DESPITE THE FACT THAT ACTS OR REPRESENTATIONS OF CONCEALMENT ARE UNNECESSARY AS HEREABOVE SET FORTH PARTICULARLY SINCE THE COMPLAINT IS UNDER 10 YEAR STATUTE, EXAMINATION OF PLAINTIFF'S COMPLAINT WILL INDEED FIND THINGS IN THE RECORD SUGGESTING FRAUDULENT CONCEALMENT TO WIT:

> Paragraph 13: On a number of occasions plaintiff conferred with defendant, on each occasion she was reassured that the assets of the decedent were securely in keeping of defendant.
>
> paragraph 15: Defendant allowed Phillip Makin to control decedent's business and take possession of decedent's personal property . . . in spite of the fact that Makin had already shown his bad faith.
>
> paragraph 16: Unbeknown to plaintiff on March 13, 1970, attorney for Harris . . . effected a transfer of decedent's will to Indiana. Plaintiffs have since learned . . . decedent took great pains to preserve his legal residency in Illinois.
>
> paragraph 17: With full knowledge of defendant, an estate was opened in Indiana. Said proceeding was improper since the will and trust were still in effect . . . and neither administrator was a resident of Indiana, as required by law . . . Plaintiff was unwittingly made a party to the wrongful acts well known to the defendant.
>
> paragraph 18: That on the 13th day of July . . . six months lacking 3 days after decedent's death, . . . during all of which time defendant had been acting . . . defendant filed a document stating: Motion of Attorney for Harris Bank presenting renunciations and declinatiens of Harris . . . together with Continental Illinois.
>
> Plaintiff received no written notice of the intention of defendant . . . nor was plaintiff notified of date nor

was plaintiff present in court when petition was heard.

To the best of plaintiff's knowledge, no accounting was presented to the court by defendant.

paragraph 19: Subsequent to withdrawal of defendant, plaintiff learned that it allowed decedent's business to be wrongfully usurped and controlled. Then without plaintiffs knowledge, defendant . . . who had by the trust instrument sole direction over said corporation allowed the voluntary cessation of operations of said corporation to be effected.

The heirs were not only powerless, they were uninformed. Clearly the record shows concealment.

p. 9. par. 2.

We find it unnecessary to determine the issues . . . of whether or not a trust relationship existed because . . . any such which may have existed terminated when plaintiff became aware of defendant's renunciation of its appointment as executor trustee.

PLAINTIFF RESPECTFULLY POINTS OUT THAT ONCE MORE THE APPELLATE COURT MISREPRESENTS A MATERIAL FACT. DEFENDANT DID NOT, AT ANY TIME RENOUNCE AS TRUSTEE. ITS CLEVERLY WORDED RENUNCIATION WAS DESIGNED TO DECEIVE PLAINTIFF INTO BELIEVING THAT THEY HAD DECLINED TO ACT AS TRUSTEE . . . AND IT WORKED SO WELL, IT WAS NOT UNTIL NOVEMBER 24, 1976, that plaintiff learned they had not. (see appendix)

p. 9. par. 2.

We conclude . . . since plaintiff's complaint was filed November 12, 1976 over 5 years after all pertinent events in this action had transpired the suit is barred ILL. Rev. Stat. 1975 Ch83 Sec. 16.

THUS THE COURT ERRED ONCE MORE. PLAINTIFF'S COMPLAINT STATES

paragraph 2: During his lifetime, decedent . . . did execute a 4 page written document known as a last will and testament . . . wherein he did give devise and bequeath all his residuary estate to Chicago National Bank as trustee in trust for the purposes set forth in aforesaid will and testament and as executor of same.

paragraph 4: That the assets of Chicago National Bank were acquired by Harris.

paragraph 5: That Harris became executor trustee under the terms of the express testamentary trust as set forth in C. J. S. vol 9 Sec. 468 p. 928: Bank which acquires assets of another . . . assumes all its known liabilities.

paragraph 14: That through all of the above acts defendant did accept . . . appointment as trustee.

Acceptance of trusteeship ordinarily may be made with no formality.

Acceptance be affected by acts complying consent. *Hoffman* v. *Gould* 64 N. E. 2d 773 327 Ill. App. 428:

> Exercising power over property is an acceptance of trust.

paragraph 20: That Harris did breach the testamentary trust of decedent . . . which breach resulted in waste, loss, and untold damages.

As a result of defendant's breach of trust, plaintiffs have been damaged . . .

WHEN PLAINTIFF'S COMPLAINT SO PLAINLY SETS FORTH THE DEFENDANT'S BREACH OF A WRITTEN DOCUMENT WHICH CARRIES A TEN YEAR STATUTE, CLEARLY THE APPELLATE COURT ERRED IN BARRING SUCH COMPLAINT BY ILL. REV. STAT. 1975 Ch 83 sec. 16.

THE COGENT STATUTE IS ILL. REV. STAT. 1975 Ch 83 Sec. 17. WHILE THE SECTION OF PLAINTIFF'S COMPLAINT THAT RELATED TO THE BREACH OF FIDUCIARY DUTY IS GOVERNED BY ILL. REV. STAT. 1975 Ch 83, Sec. 23.

p. 9. par. 3.

Plaintiff has not offered any reason why matters raised herein could not have been brought to the attention of the probate court.

FOR REASONS UNKNOWN TO PLAINTIFF, THE APPELLATE COURT HAS CHOSEN TO DISREGARD PLAINTIFF'S COMPLAINT AS WELL AS PLAINTIFF'S ORAL ARGUMENT. PLAINTIFF RESPECTFULLY STATES THAT CONCEALED MATTERS COULD NOT BE RAISED AS PLAINTIFF SET FORTH IN HER COMPLAINT, AND WHEN DISCOVERED, COULD NOT BE RAISED IN COURT WHEN PLAINTIFF'S ATTORNEYS FAILED AND REFUSED TO DO SO.

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT PROBATE DIVISION

ESTATE OF ERNEST J. SANDER, Deceased

No. 70 P 5652
Docket 746
Page 551

ORDER
(Filed JUL 13 1970)

This matter coming on to be heard upon the motion of Ralph C. Blaha, attorney for Harris Trust and Savings Bank, presenting the Renunciations and Declinations of Harris Trust and Savings Bank, together with Continental Illinois National Bank and Trust Company, Successor Executor under the Will of Ernest J. Sander, deceased;

IT IS HEREBY ORDERED that leave be and the same is hereby granted to Harris Trust and Savings Bank (which merged with Chicago National Bank), and Continental Illinois National Bank and Trust Company, to file their Renunciations and Declinations as Executor and Successor Executor instanter.

Matthew J. Danaher
Clerk of the Circuit Court

Enter:

/s/ Illegible
Judge

Name Ralph C. Blaha
Attorney for Harris Trust and Savings Bank
Address 100 W. Monroe St.
Chicago, Illinois 60603
Telephone An. 3 5730

APPENDIX H-1

JUSTICE McGLOON: I might say in passing that your attorney prepared a very good brief.

MS. HARVEY: Yes, Your Honor, he had prepared a very good brief.

That's what I'm saying. All of my attorneys had prepared very good briefs. They just, somehow or other, failed to bring the real facts before the court.

You find nowhere in there that Mr. Brewer says that the lady is alleging violation of a written agreement which carries a ten year statute, which my complaint alleges.

And so, my point is that the lower court had no right to dismiss it because there was a ten year statute on it.

Further, Mr. Blattberg says these things. In his affidavit he says, all these matters have been decided by a prior complaint before the court when, in fact, a motion to dismiss decides nothing.

It was never tried.

I'd like to get the matter before a jury, which is what I have been petitioning for all along, because I do not hold the judges responsible at all.

The fact is, the—the facts are never brought before the judges.

And so, that is my contention, that the complaint carried a ten year statute, and it was dismissed on the grounds that it was the same as the previous complaint which carried a five, and that I did allege fraudulent concealment of the other acts which does toll the statute.

So, in all, I do not feel the complaint should have been dismissed.

Thank you, Your Honor.

THE COURT: We'll hear from the other side now, if you please.

MR. BLATTBERG: May it please the court, I represent the appellee, Harris Trust and Savings.

This kind of argument is a very difficult one for me to try to respond to as to—because there's an attempt here to try to testify at the same time as making an argument.

I'd like to say that we supported our motions to strike and dismiss with affidavits and those affidavits were not responded to. There were no counter-

It's very clear that they were very careful to try and preserve this knowledge, and—and they did a very good job of it.

I found out none of it. I had suspicions. Until I began writing, I knew none of it.

The point is that, before the court this morning, the matter is that there was a will and a trust. It was a written instrument.

The Harris Bank did not act properly in regard to it. That is a violation of a contract, and that carries a ten year statute.

Thank you, Your Honor.

THE COURT: Case is taken for a decision.

Will you call the next case, please.

* * * * *

APPENDIX H-2

record, a great many of the assets had been done away with, unquote, including my father's corporation, prior to Harris' declining to act as executor.

And may I respectfully point out, they never did decline to act as trustee, so there was no possible way we could be protected.

These things are not brought out by my attorney, and I must bring them before the court, because I have no other forum in which to bring these things forth.

I had never seen Mr. Blattberg's document here or I would have been trying—I probably would have had counsel replaced before this, but I never saw it.

JUSTICE CAMPBELL: Mrs. Harvey, let's see if I understand you.

First, you're saying there was an attorney for your mother in the Probate Court?

MS. HARVEY: Yes, Your Honor.

JUSTICE CAMPBELL: And, secondly, there's a second attorney prior to Mr. Brewer?

MS. HARVEY: Yes, Your Honor.

JUSTICE CAMPBELL: And Mr. Brewer was the (inaudible) in renouncing (inaudible to reporter)?

MS. HARVEY: No, Your Honor, according to the Probate Act, I now know they are either to renounce or decline within thirty days.

The truth of the matter was, when their renunciation—and again I point to the court—executor only. They never did renounce as trustee which allowed the decedent's trust to die.

Not only that, but they went in simultaneously with Continental Illinois who was the successor executor trustee.

The successor and the trustee renounced simultaneously without notifying the heirs and without going in to have a successor appointed.

And this was done after they obviously had found out what had happened to the corporation, because I had their receipts to the fact that they had gone over all of the documents, and have a receipt from the man who was managing it, so they knew full well what happened.

The corporation, unbeknown to me, all the assets had been dissipated and had ceased to function, by the records they filed with the tax authorities of Chicago in—before June of 1970.

that the executor, if he declines, is by law required to account to the trustee.

And that probably explains why Harris didn't renounce their appointment as trustee, because then there was no one except Harris to account to Harris.

Now, if this isn't concealment, I don't really quite know what to term it, Your Honors.

We had no knowledge whatsoever.

I didn't even know, because of the way they filed the petition and headed it, that the executor trustee, Harris, were renouncing and declining their appointment as executor.

Even the first three or four times I read that document, until, as a matter of fact, Mr. Brewer, my attorney, pointed it out to me in December of 1976.

I wasn't aware that they had declined to act as trustee.

So, I say, by all these things, there has been fraudulent concealment.

Furthermore, I attempted many times to get the records on the corporation known as John Sander, Incorporated from Harris Bank.

APPENDIX I

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

BETTY SANDER HARVEY (a/k/a DAVIS), DOUGLAS ALAN DAVIS, and WILLIAM PORTER DAVIS,

Plaintiffs,

v.

HARRIS TRUST AND SAVINGS BANK,

Defendant.

NO. 76 L 20780

ORDER

THIS CAUSE coming on to be heard upon Plaintiff, Betty Sander Harvey's Motion to Vacate the Order of June 22, 1977, and motion for leave to file an Amended Complaint instanter, the Court having before it the Complaint, the Motion to Strike and Dismiss the Complaint, the Affidavits filed by the Defendant in support of said Motion to Strike and Dismiss, the Motion to Vacate and the proposed Amended Complaint and all other documents filed in this cause together with all documents exhibited by counsel in open court, and the Court having heard statements and arguments of counsel for the parties herein and being fully advised in the premises:

IT IS HEREBY ORDERED that:

1. The Motion to Vacate the Order of June 22, 1977, is hereby denied with prejudice; and

2. The Motion for leave to file an Amended Complaint instanter is hereby denied with prejudice.

Respectfully submitted,

ENTER: Judge Daniel P. Coman

NOV 22 1977
Circuit Court

APPENDIX J

52313

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 1, 1979

Ms. Betty Sander Harvey
834 Monroe Avenue
River Forest, IL 60305

No. 52313—Betty Sander Harvey, etc., petitioner, vs. Harris Trust and Savings Bank, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ *Clell L. Woods*
Clerk of the Supreme Court

APPENDIX K

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

BETTY SANDER HARVEY (a/k/a Davis), Douglas Alan Davis, and William Porter Davis,

Plaintiffs-Appellants,

v. NO. 78-322

HARRIS TRUST AND SAVINGS BANK,

Defendant-Appellee.

NO. 78-322

ORDER

Upon consideration of the petition for rehearing filed by plaintiff-appellants on July 2, 1979, said petition is DENIED.

ENTER:

/s/ *Mayer Goldberg*
Presiding Justice—Division I

/s/ *Thomas A. McGloon*
Justice

/s/ Illegible
Justice

July 9, 1979

APPENDIX L

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

BETTY SANDER HARVEY (AKA DAVIS)
DOUGLAS ALAN DAVIS
WILLIAM PORTER DAVIS

Plaintiffs

V. NO. 76L 20780

HARRIS TRUST & SAVINGS BANK

Defendants

JURY DEMAND

(Filed Nov 12 1976)

The undersigned demands a jury trial.

/s/ *Betty Sander Harvey*

Name Betty Sander Harvey (aka Davis)

Attorney for Pro Se

Address 834 Monroe Avenue

City River Forest, Illinois 60305

Telephone 369-6549